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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 468th MEETING

Held at Headquarters, New York,
on Monday, 4 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL-ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 16

1. The CHAIRMAN said that, owing to a lack of support in the Commission, the representative of Germany had agreed to withdraw his objection to the notion of objective liability, on condition that his delegation's views were reflected in the record.

2. The Commission must determine whether paragraph (1) of article 16 should use the wording originally proposed by the Working Group on International Payments, as set out in annex I to the Commission's report on the work of its twenty-fourth session (A/46/17), or that proposed by the United Kingdom and Finland (A/46/17, para. 278). In addition, the representative of Germany had raised the question of extending liability to the originator when a financial transfer was not completed, a situation contemplated in paragraph (2 ter) of the United Kingdom/Finnish proposal.

3. Mr. FUJISHITA (Japan) said that his delegation would have no objection to paragraphs (1) and (2 ter), provided that the points he had raised at the previous meeting were dealt with properly when the Commission considered articles 16 (8) and 17 (1).

4. The CHAIRMAN, suggested that the Commission should adopt paragraph (1) and that paragraphs (1) and (2 ter) of the United Kingdom/Finnish proposal should be referred to the Drafting Group for further review.

5. It was so decided.

6. The CHAIRMAN suggested that the Commission should adopt paragraph (2).

7. It was so decided.

8. Mr. GREGORY (United Kingdom), referring to paragraph (2 bis) of the United Kingdom/Finnish proposal, said that the purpose of article 16 was to provide a structure in which the obligations in the Model Law that were essential to the operation of a credit transfer would have some liability attached to them. Paragraph (2 bis) was therefore necessary to explain that one of the failures that could incur liability under paragraph (1) was the failure to pay. He noted, however, that the word "pay" did not cover the debiting of a sender's account at the receiving bank, which could be done at any time.

9. If a rule obliged a bank to pay in a timely fashion, the appropriate time for such payment was when funds were available in the account. The rule was

(Mr. Gregory, United Kingdom)

meant to apply to a bank that received money but held on to it even though it had issued a payment order consistent with the one received. Such a rule would clarify the obligations referred to in paragraph (1).

10. Mr. FELSENFELD (United States of America) said he was sympathetic to the objectives of the representative of the United Kingdom, but felt that paragraph (2 bis) would not accomplish them. He had a number of objections to that paragraph: for example, the paying bank must make payment to any receiving bank that accepted a payment order whether or not the sending bank had been paid. He was not sure what sanctions should apply if such was not the case. The reference to a delay caused by failure to pay was also unclear. A bank that issued a payment order that was accepted must cover that payment order, and failure to do so constituted a violation of the obligation. Whether or not failure to pay caused delay was irrelevant to the transaction. Finally, the Commission had already decided that no specific penalty would be provided for banks that were unable to pay.

11. Ms. KOSKELO (Observer for Finland) said that paragraph (2 bis) was not intended to deal with situations where a sending bank failed to execute a payment order already accepted by a receiving bank. The need for that paragraph arose from the fact that a bank that had received and accepted a payment order could delay the credit transfer in two ways: by executing the payment order too late, or by issuing its own payment order but failing to make payment available to the next bank. In the latter case, the next bank would not accept the order and delay would result.

12. The CHAIRMAN pointed out that article 4 (6) established that when a bank accepted a payment order, the sending bank must pay the receiving bank for that payment order. Article 7 (2) established the obligations of banks. If a bank accepted a payment order, the normal assumption was that that bank had the necessary funds. However, it could not hold up the transaction if funds were not available; having accepted the original payment order, it must then issue a new order. By failing to do so the bank was flouting its responsibilities.

13. Mr. BURMAN (United States of America) said that paragraph (2 bis) could pose real problems. The observer for Finland had said that the paragraph was not meant to deal with the case of a sending bank that failed to pay. In a credit transfer, however, a receiving bank that accepted a payment order and issued a new order of its own became by that very act a sending bank. The non-payment or delayed payment of such orders by receiving banks was in fact an illusory problem. The so-called failure to pay was actually credit, and billions of dollars went through banks' books without any "cover" ever having been provided. Article 4 (6) established an obligation to pay and that obligation need not be expanded.

14. To include paragraph (2 bis) in article 16 would interfere with the credit decisions made by receiving banks and would introduce complications

(Mr. Burman, United States)

into high-volume, high-speed credit transfers. In practice, receiving banks never matched incoming and outgoing payment orders on a one-to-one basis. Such an obligation would be very cumbersome to legislate.

15. Mr. JONES (United Kingdom) said that he was familiar with the practical problems raised by the United States representative. However, paragraph (2 bis) sought to impose an obligation that would prevent banks from issuing payment orders unless they could pay for them. The problem was in fact exacerbated by high-speed financial transfers, which were slowed tremendously by large numbers of transactions without cover. Consequently, his delegation's proposal sought to create a situation in which most payment orders were drawn on available credit and the flow of transactions was not slowed by a lack of credit.

16. Ms. KOSKELO (Observer for Finland) said that the new rule would not interfere with the credit decisions of receiving banks. If a receiving bank was willing to execute a payment order even though it had not been paid or had received assurance that it would get cover, no problem arose, except in the rare case where a receiving bank was not willing to give credit to the sender. The problem addressed in the proposal arose when a receiving bank was not prepared to execute a payment order without the assurance of cover: in that situation, a delay would be caused by the sending bank's failure to make cover available.

17. As to the objection that the new rule would create an operational burden arising from the need to match payments and payment orders, she stressed that the proposed rule merely sought to impute liability. Thus it did not imply the introduction of any features in the actual processing of payment orders.

18. Mr. DE BOER (Observer for the Netherlands) said that he favoured the United Kingdom/Finnish proposal. His delegation had submitted a proposal at the previous session that would have had the same result. Any delay that was caused because a bank had issued a payment order and had not provided cover must have a remedy. The draft Model Law had a lacuna in that respect.

19. Mr. JANSSON (Observer for Sweden) supported the views expressed by the observer for the Netherlands.

20. Mr. JONES (United Kingdom) said that the practical problems raised by the representative of the United States of America were not relevant to article 16. His delegation did not see any difference between a situation in which funds were actually available and one in which credit was given. While he agreed that payments were not matched on an individual basis, his delegation's proposal did not require any matching whatsoever. What was important was whether the receiving bank had actually received sufficient funds by any means; if so, and if it decided to accept payment and make another payment, it must not hold onto those funds.

21. Mr. BURMAN (United States of America) said that, unfortunately, ideas that sounded logical were colliding with commercial reality. The Commission was displaying an inclination to overregulate; and seeking to give some kind of legal imprimatur to the shadowy concept of cover. In the commercial world a wide variety of payment orders were executed because a bank along the chain, following its own commercial judgement, chose to accept and execute them. In the real world payment orders from a variety of countries often did not have money behind them. If the Commission's purpose was to promote trade and commerce, it should not revive the concept of cover. If it tried to overregulate the system, it would not have any influence in the growing world of computer-assisted banking.

22. Mr. FELSENFELD (United States of America) said that the draft Model Law had always been based on the simple idea that every credit transfer, whether there was cover or not, could be accepted or rejected by the receiving bank without restriction. There was no lacuna in the draft Model Law in that respect. In asking for cover, the receiving bank itself could create a delay; such a course of action would not be consistent with good credit practice or with the theme of the draft Model Law.

23. The CHAIRMAN said that the text of paragraph (2 bis) had gained very little support. Therefore, if he heard no objection, he would take it that the Commission decided not to include paragraph (2 bis) in article 16.

24. It was so decided.

25. Mr. BERGSTEN (Consultant to the Secretariat) said that since article 7 (3) had been deleted at the previous session, the reference to that article in paragraph (3) of article 16 should also be deleted. In paragraph (4), the reference to article 9 should read "paragraphs (2), (3) or (4)".

26. Mr. BHALA (United States of America) said that paragraphs (3) and (4) of article 16 dealt with notification duties that sometimes arose in the event of inconsistencies in payment orders. While the Commission had already considered certain aspects of that issue, it might wish to revert to it at some point.

27. Paragraphs (3) and (4) were adopted.

28. Ms. KOSKELO (Observer for Finland), speaking with reference to article 16 (5), said that she had difficulty with two aspects of the text proposed by the Working Group which were addressed in the proposal put forward by her delegation and that of the United Kingdom. Paragraph (5) provided for liability to the beneficiary for interest that was not placed at the disposal of the beneficiary on the payment date, so that liability in the case of partial delay would arise only if a payment date was specified in the payment order. That represented a deviation from the general rule set out in article 16 (1), which made a bank liable for interest regardless of whether the order contained a designated payment date.

(Ms. Koskelo, Observer, Finland)

29. The last sentence of paragraph (5) also constituted a deviation from paragraph (1). All that needed to be said was that if only part of the amount to be transferred had been delayed, interest should be paid on the amount that was delayed.

30. Mr. GREGORY (United Kingdom) agreed with the views expressed by the representative of Finland.

31. Mr. EL-SHARKAWY (Egypt) noted that paragraph (5) provided for the same penalty as paragraph (1). However, while the liability in paragraph (1) was not based on fault but was an objective liability, that in paragraph (5) was based on fault because the amount in question was less than the amount of the payment order the receiving bank had accepted. The Model Law should differentiate between the two situations.

The meeting was suspended at 4.30 p.m. and resumed at 4.55 p.m.

32. The CHAIRMAN recalled that the Working Group had not discussed the principle reflected in the last sentence of paragraph (5). He therefore welcomed the solution which the United Kingdom/Finnish proposal offered to the problem of payment orders for lesser amounts.

33. Mr. DUCHEK (Austria) said that the United Kingdom/Finnish proposal was preferable to the Working Group's text. The expression "the receiving bank's improper action" was imprecise and should be avoided.

34. Mr.AZZIMAN (Morocco) said that he shared the concerns expressed by previous speakers. He had difficulty understanding the difference between a total and a partial failure to execute a payment order; the liability would be the same in both cases. He therefore supported the United Kingdom/Finnish proposal to reflect both situations in paragraph (1).

35. Mr. CHATURVEDI (India) said that his delegation's understanding of the proposal was that the last sentence of paragraph (5) should become the last sentence of paragraph (1); if that was correct, his delegation would support the proposal.

36. Mr. LE GUEN (France) agreed with the representative of Morocco: both situations should be reflected in paragraph (1).

37. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to delete paragraph (5).

38. It was so decided.

39. The CHAIRMAN said that paragraph (6) dealt with the liability of the beneficiary's bank towards the beneficiary under the applicable law. Once a

(The Chairman)

credit transfer had been completed with the acceptance of the payment order by the beneficiary's bank, the relationship between the bank and the beneficiary no longer fell within the scope of the Model Law. The purpose of article 16 (6), then, was to ensure that the beneficiary's bank, in complying with the obligations imposed on it under articles 9 (1) and 9 (5) was not exempt from the liability provided for in article 16.

40. Mrs. AUGIER (France) expressed reservations concerning paragraph (6) which related to the notion of "completion" of a credit transfer as defined in article 17. Her delegation wished to ensure that a transfer would not be regarded as completed until the funds were available to the beneficiary.

41. Mr. LIM (Singapore) suggested that the reference to article 9 (1) or (5) should be moved to the beginning of paragraph (6) in order to make it clear that the liability in question related to the obligations under those paragraphs.

42. Paragraph (6) was adopted.

43. Mr. AL-NASSER (Saudi Arabia) said that the commercial banks in his country felt that paragraph (7) should be deleted, as it reflected an issue that was covered by the principle of contractual freedom.

44. Mr. CHATURVEDI (India) said that his delegation favoured the retention of the paragraph.

45. Mr. LIM (Singapore) noted that the paragraph had been omitted from the United Kingdom/Finnish proposal. If the intention was to give parties maximum contractual freedom, then the paragraph ought to be deleted, since it would limit the possibilities for varying the provisions of article 16.

46. Mr. GREGORY (United Kingdom) said that the authors of the proposal had not intentionally omitted paragraphs (6) and (7) from their redraft of article 16; new versions had not yet been submitted.

47. Mr. VASSEUR (Banking Federation of the European Community) said that the organization which he represented hoped that the Model Law would provide for maximum contractual freedom. Accordingly, the last sentence of paragraph (7) should be deleted, and it should be clearly stated that a bank could agree to increase or reduce its liability to an originator or beneficiary. As such decisions were related to cost, it should be left to the bank and the client to negotiate the scope of the bank's liability.

48. Drawing attention to paragraph 4 of the secretariat's comments on article 16 (A/CN.9/346), he noted that a comparison was made with conventions on the international carriage of goods. It would appear that where the carriers were jointly liable, the system of liability could be set aside by agreement between the parties. Such an arrangement would be appropriate with regard to the liability of a bank.

(Mr. Vasseur)

49. Furthermore, where an originator gave a formal payment order, requiring execution in a particular manner by a specific intermediary, the bank should not incur any special liability, and that, too, should be provided for in the text.

50. Lastly, the Banking Federation of the European Community wished to see the provisions of prior article 13 (A/46/17, para. 250) incorporated either into article 16 or into a separate article, so as to ensure that a bank would be exempted from all liability in case of force majeure.

51. The CHAIRMAN said that the Commission would in due course discuss the possible reintroduction of prior article 13. With regard to conventions on the international carriage of goods, to which the previous speaker had referred, all such conventions, to the best of his knowledge, provided for the liability of the various carriers to the shipper, but did not permit the carriers to agree to increase or reduce their liability to the shipper or the owner of the goods. In fact, carriers were prohibited from setting lower limits on their liability, to the detriment of the shipper or the owner of the goods, than those provided for in the convention.

52. Ms. KOSKELO (Observer for Finland) said that paragraph (7) had indeed been deliberately omitted, as the first two sentences of the paragraph were covered by article 3, and as article 16 (ter) provided that the bank's liability would be mainly to the beneficiary.

53. Mr. DE BOER (Observer for the Netherlands) said that if the provisions of paragraph 7 were deleted, circumstances might arise where a bank could reduce its liability to an absolute minimum. Such a situation would undermine the whole consensus that had been achieved on the Model Law. The paragraph was therefore not superfluous and should be retained.

54. The CHAIRMAN said he agreed with the representative of Finland that, in the light of the provisions of article 3 concerning freedom of contract, paragraph (7) was to some extent superfluous. However, he felt that the last sentence of the paragraph should be retained, even if the circumstances it covered were unusual. There was a possibility that a bank might attempt to reduce its liability to a non-bank beneficiary, and the prohibition in question was therefore required.

55. Mr. BURMAN (United States of America) said that the retention of paragraph (7) should be discussed further. It might also be necessary to return to paragraph (7) once a decision had been taken on paragraph (8), which also concerned liability.

56. Mr. AZZIMAN (Morocco) said that the final sentence of paragraph (7) was a useful measure which afforded protection to customers. The general liability of banks under the Model Law was already somewhat limited and the way should not be left open for further restrictions to be imposed. Furthermore, the

(Mr. Azziman, Morocco)

clauses limiting liability might well be subject to different interpretations in different countries. The provision should therefore be maintained.

57. Mr. EL-SHARKAWY (Egypt) said that the final sentence of paragraph (7) was based on the assumption that a contractual relationship existed between the bank in question and the beneficiary. He could not imagine how such a relationship was possible.

58. The CHAIRMAN pointed out that the sentence in question referred not only to a beneficiary, but also to an originator, and that a contractual relationship between a bank and an originator was perfectly feasible.

59. In view of the broad support expressed for paragraph (7), he urged delegations having reservations to remember the spirit in which the Working Group had drafted the Model Law and asked whether they would be willing to accept the retention of paragraph (7) on the understanding that the Drafting Group would consider the necessity of the first two sentences in the light of the provisions of article 3 concerning freedom of contract.

60. Mr. CHATURVEDI (India) said that his delegation would prefer to retain paragraph (7) as it stood.

61. Mr. SCHNEIDER (Germany) said that the issue at hand was not merely a drafting matter; the full text should be maintained. The second sentence in particular was important in the context of the harmonization of provisions governing general conditions within the European Community.

62. The CHAIRMAN said that the Drafting Group would be asked to address the concern expressed by the representative of Germany.

63. Mr. BURMAN (United States of America) said that it should be made clear in the Commission's report that the inclusion of the second sentence of paragraph (7), and the fact that that provision did not appear elsewhere, should not be taken to mean that banks were not permitted to use standard terms of dealing with respect to other matters dealt with in other paragraphs.

64. The CHAIRMAN said that the Drafting Group would be asked to take note of that concern. Perhaps a reference thereto could be included in article 3, which was the most appropriate place.

65. Ms. KOSKELO (Observer for Finland) said that the question raised in the second sentence of paragraph (7) had also been discussed at the Commission's twenty-fourth session in connection with article 3. On that occasion, it had been decided not to include a reference to standard terms of dealing and to leave the question open. If a specific reference was made to standard terms of dealing, the question might arise as to how that provision related to other parts of the Model Law, thereby creating difficulties when the Model Law was adopted by national legal systems. It would therefore be best to omit the provision and leave the matter for individual countries to determine.

66. The CHAIRMAN suggested that the second sentence of paragraph (7) should be retained, in keeping with the decision of the Working Group, and that further consideration should be given to the possibility of including other stipulations in the standard terms of dealing. The Commission should also consider the possibility that, by stipulating very low interest rates, a bank could eliminate its liability under article 16 (7). In that case, either the sentence referring to freedom of contract in the definition of interest could be deleted, or appropriate language could be included in paragraph (7) of article 16.

The meeting rose at 6 p.m.

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Twenty-fifth session

SUMMARY RECORD OF THE 469th MEETING

Held at Headquarters, New York
on Tuesday, 5 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.05 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. The CHAIRMAN, in inviting the Commission to resume consideration of article 16 (7) of the draft Model Law, as set out in annex I to document A/46/17, recalled that some fears had been expressed that banks might stipulate derisory interest rates in order to evade their obligation under article 16 to pay interest for failure to execute a payment order. He wished to suggest the deletion of the reference to the contractual freedom of the parties contained in the words "unless otherwise agreed" (A/46/17, para. 89), since the concept of contractual freedom was already covered in article 3. Banks would thus be precluded from stipulating that their liability to clients was less than provided for in article 16 (7).

2. Mr. GREGORY (United Kingdom) said that, while he agreed in principle with the Chairman's suggestion, he had a conceptual difficulty with the idea that the definition of a word might be varied by agreement.

3. Mr. CRAWFORD (Canada) shared the doubt just expressed by the representative of the United Kingdom concerning the varying of a definition. The words "unless otherwise agreed" had a very important function, since without them banks would be governed only by the uncertain provision that interest should be calculated at the rate and on the basis customarily accepted by the local banking community (para. 89). He could not see how such a provision would work in practice. Moreover, the requirement to have recourse to customary practice would impose severe limitations on the contractual freedom of banks. If the Commission were to concern itself with the ability of banks to partially remove the remedy of interest provided for in the draft Model Law by stipulating derisory interest rates, it would be embarking on the topic of consumer protection, a field expressly disavowed in the draft Model Law.

4. The CHAIRMAN said that the alternative to his suggestion to delete the words "unless otherwise agreed" from article 16 bis would be to retain the principles agreed to in article 16 (7), according to which banks would have total freedom to make stipulations in respect of interest in accordance with article 3. Article 16 (7) permitted banks to provide for higher limits on their liability to clients, but prohibited them from discriminating against non-bank originators by requiring that the interest should be defined in accordance with article 2.

5. Mr. CRAWFORD (Canada) said that he had no objections to article 16 (7), since it provided an acceptable minimum level of protection to clients by prohibiting banks from paying derisory interest or no interest at all. The Commission's final text should, at the same time, protect contractual freedom as far as possible. The definition of "interest" contained two equally

(Mr. Crawford, Canada)

important elements: an agreed interest rate and an ascertainable interest rate. The fear had been expressed that banks might attempt to impose derisory interest rates for the purposes of article 16 (7). He would be reluctant to preclude the possibility for the parties to agree on the rate, merely in order to forestall such attempts. The danger of such attempts being made was not sufficiently grave as to warrant the distortion of two sound articles.

6. Mr. GREGORY (United Kingdom) wondered whether, in defining "interest", it was not possible to preserve the element of contractual freedom while adding some formulation such as "subject to article 16 (7)".

7. The CHAIRMAN asked whether the Commission wished to retain article 16 (7) and the definition of interest in their current form.

8. Mr. OLSZOWKA (Poland) supported the suggestion of the representative of the United Kingdom to add the words "subject to article 16 (7)".

9. Mr. CHATURVEDI (India) said that both article 16 (7) and the definition of "interest" should be left unchanged.

10. Mr. LIM (Singapore) said he would welcome clarification from the representative of the United Kingdom as to how the addition of the words "subject to article 16 (7)" would overcome the problem of the definition of interest.

11. Mr. GREGORY (United Kingdom) said that the problem was one which he had raised earlier: that of a definition subject to variation by agreement. The words "unless otherwise agreed", however, served a specific purpose in the case at hand, since they referred to the basis on which interest was to be calculated. The current definition provided for either an ascertained rate or an agreed rate. If banks must be given the capacity to stipulate rates of interest by agreement, then it should be possible to restrict the types of such agreement to ensure that they were not contrary to the principle set forth in article 16 (7).

12. Mr. CRAWFORD (Canada) said that, since users who received derisory interest as compensation should be able to seek remedy under the second part of the definition of interest, he would suggest the addition of another sentence to article 16 (7) along the following lines: "When fixing the rate of interest, the bank may not by agreement bargain for a rate lower than that calculated on the basis customarily accepted."

13. Mr. BURMAN (United States of America) said that, in view of its time constraints, the Commission should be quite clear as to what it wished to accomplish before referring a matter to the Drafting Group.

14. Mr. EL-SHARKAWY (Egypt) said that article 16 (7) should be read in conjunction with article 16 (1). Under paragraph (1), liability was determined by the rate of interest. It might be possible to use the LIBOR rate in effect on the date on which the payment of interest was due.

15. The CHAIRMAN proposed that the Drafting Group should be invited to prepare an appropriate text which would maintain the contractual freedom of parties to fix interest rates, while guarding against abuse of article 16 (7) in the form of derisory interest rates. If he heard no objection, he would take it that the Commission accepted his proposal.

16. It was so decided.

17. The CHAIRMAN referred the Commission to article 16 (8) as set out in annex I to document A/46/17.

18. Mr. EL-SHARKAWY (Egypt) asked why article 16 (8) had precluded recourse to remedies in other laws and doctrines which were favourable to the beneficiary. He suggested that the remedies in the draft Model Law should be exclusive except where the remedies in other legal systems were more favourable to the beneficiary.

19. The CHAIRMAN said that such agreement as existed on paragraph (8) had been reached after strenuous debate. The Bank representing the interests of the banking community had conceded the principle of objective liability to non-bank originators and beneficiaries. In return, it had been agreed that, unless they themselves agreed otherwise, the liability of banks would be limited to the payment of interest, and would not include consequential damages. The implications of removing that protection were enormous in view of the unforeseeable nature of possible damages.

20. Mr. CHATURVEDI (India) said he agreed with the representative of Egypt that certain other remedies, particularly judicial instances, should not be precluded. He would therefore suggest the deletion of the second sentence of paragraph (8).

21. The CHAIRMAN said that paragraph (8) established, firstly, that liability existed even where no contract provided for a bank's liability to the user. Secondly, it provided that the liability set forth in article 16 was the exclusive liability of the bank. Finally, it contained the principle that liability for interest was limited to cases of negligence or wilful failure to execute a payment order. Removal of the second sentence of the paragraph, in his view, would reopen the whole question of liability in the draft Model Law.

22. Mr. GRIFFITH (Observer for Australia) said the principle that a bank should not be liable for the payment of interest except where it had been negligent represented a compromise, even though some representatives had had difficulty with the concept of recklessness. He felt that the text in its current form could be adopted by the Commission.

23. Mr. EL-SHARKAWY (Egypt) said that paragraph (8) should be part of article 16, only if the remedies referred to in that paragraph dealt exclusively with the liability of the receiving bank to pay interest in accordance with paragraph (1) of the article. If that was not the case, paragraph (8) should be a separate article, especially since it referred to "remedies provided in this law". Moreover, it might be preferable to allow the parties to seek remedies provided by national legislation, particularly when such legislation was more favourable to the beneficiary.

24. Mr. HOLEC (Czechoslovakia) fully endorsed the views expressed by the representative of Australia. His delegation could not accept the use of the word "recklessly" in the second sentence of article 16 (8), and he proposed that the Commission should use more customary wording.

25. Mr. BISCHOFF (Observer for Switzerland) supported the proposal made by the representative of Australia. The Model Law would be incomplete without the principle contained in paragraph (8), particularly in the second sentence of the paragraph. However, he considered the wording at the end of the second sentence to be incompatible with the principle of liability for fault. He therefore proposed that the word "recklessly" should be replaced by the words "through gross negligence" or similar wording.

26. Mr. BHALA (United States of America) said that his delegation did not support the views of the representative of Australia. The Commission should avoid taking a hasty decision to conclude its consideration of article 16. His delegation had never accepted the second sentence of paragraph (8), and it did not agree with the representative of Switzerland that the Model Law would be incomplete if that sentence was deleted. The representative of India had very wisely suggested that such remedies should be left to national law. His delegation was inclined to support the proposal by the United Kingdom and Finland to delete paragraph (8) and replace it with an article 16 bis.

27. Mr. EL-SHARKAWY (Egypt) said that he was still uncertain whether or not article 16 dealt with remedies other than the liability of a receiving bank to pay interest to the beneficiary for its failure to execute its sender's payment order in the time required. It was not clear how payment of interest could be the sole remedy, especially since there was no agreement between the parties regarding the rate of interest to be paid.

28. Mr. LIM (Singapore) said that his delegation supported the views expressed by the representative of Australia. Paragraph (8) seemed to be based on formulas used in other liability conventions such as the Convention for the Unification of Certain Rules relating to International Carriage by Air (the "Warsaw Convention") and the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"). Paragraph (8) provided for certain limits on liability, subject to agreement. Such limits could still be circumvented by an allegation that a bank had improperly executed a payment order or had committed fraud or engaged in reckless behaviour. That provision was similar to the formula contained in the Warsaw Convention.

29. Mr. KOMAROV (Russian Federation) said that different countries applied different criteria for establishing liability for failure to execute contractual or non-contractual obligations. The solution contained in the draft Model Law reflected the general trend towards international unification. It was preferable that the remedies provided in the draft Model Law should be exclusive, and that the question of liability should not be dealt with by national law.

30. The exceptions referred to in the last sentence of article 16 (8) referred to cases in which a bank failed to execute a payment order or had executed it improperly. The question of execution or non-execution should be linked not so much to payment orders as to the bank's obligations under the Model Law, since, in addition to the bank's obligations to execute payment orders, the bank was subject to other obligations stipulated in the Law. If the provision contained in the second sentence of paragraph (8) was interpreted literally, the conclusion could be drawn that all those other obligations were not covered by the provisions of paragraph (8).

31. Mr. DUCHEK (Austria) said that the provisions of paragraph (8) were not similar to the provisions concerning liability in the Warsaw Convention or the Hamburg Rules. In those instruments, liability involved only two parties, while the draft Model Law dealt with a triangular relationship involving the originator, the banking chain and the beneficiary. Under the provisions of paragraph (8), the beneficiary could not address a complaint to the bank that had caused the delay in payment and the additional loss. The risk would therefore be borne by the beneficiary in cases where the originator was unable to pay, or by the originator. It was therefore questionable whether the provisions contained in paragraph (8) were justified in all circumstances.

32. His delegation was in favour of deleting the second sentence of paragraph (8) and leaving the question of liability to national legislation. His delegation supported the proposal made by the United Kingdom and Finland.

33. Mr. SANDOVAL (Chile) said that his delegation was in favour of retaining paragraph (8) as it stood.

34. Mr. ROJANAPHAUR (Thailand) said that his delegation was in favour of retaining the second sentence of paragraph (8) without change.

35. Mr. SCHNEIDER (Germany) said that, if the second sentence of paragraph (8) was deleted, the Commission would have to reopen its debate on all the other issues. It was true, however, that the Commission was discussing a compromise that had never been precisely defined. In a previous draft of the Model Law, it had been explicitly stated that there should be no remedies for consequential damages. That stipulation had been eliminated because other remedies had to be taken into account.

36. The second sentence of paragraph (8) was so important that it should be made a separate article. However, that sentence required some clarification,

(Mr. Schneider, Germany)

and he proposed that the words "which would increase the liability of the bank" should be inserted between the words "doctrines of law" and "shall be available". While it would be possible to increase such liability by contract, there should be no increase in liability without the bank's agreement.

37. Mr. ZHAO Chengbi (China) said that his delegation was in favour of retaining the current wording of paragraph (8).

38. Mr. CRAWFORD (Canada) said that he agreed entirely with the points made by the representative of Germany. The representatives of the United States and Austria had expressed concerns about the possible misinterpretation of the second part of the second sentence of paragraph (8). However, he did not believe that either delegation objected to the idea that the interest remedy should be exclusive. Perhaps the Commission should consider deleting the second part of the second sentence.

39. The CHAIRMAN said that the representatives of Austria and the United States were in favour of deleting not only the second part of the second sentence of paragraph (8), but the second sentence in its entirety. Moreover, the representative of the United States had expressed support for paragraph 16 bis, proposed by the United Kingdom and Finland.

The meeting was suspended at 11.30 a.m and resumed at 11.50 a.m.

40. Mr. CHATURVEDI (India) said he agreed with the Canadian representative that the last part of the second sentence of paragraph (8) posed real problems, as it referred to matters which were difficult to prove. He would therefore prefer either that the second sentence should be deleted entirely, or that it should end with the words "executed a payment order".

41. Mr. OLSZOWKA (Poland) said that his delegation would prefer to leave the text of paragraph (8) as it stood.

42. Mr. EL-SHARKAWY (Egypt) said that a choice must be made between either adopting paragraph (8) as drafted or leaving the entire matter to the remedies available under national law, as those were the only ways to maintain the balance achieved in the paragraph between the various interests involved.

43. Mr. GRIFFITH (Observer for Australia) suggested that the last part of the second sentence of paragraph (8) should be amended to read: "(b) recklessly and with particular knowledge that damage might result."

44. Mr. BURMAN (United States of America) said that, because of the nature of international credit transfers, it was necessary to establish the limitations of liability carefully. The goal was to impose on banks the minimum amount of liability possible; as it stood, however, the second sentence would make possible the imposition of far too much liability.

45. The CHAIRMAN suggested that an effort might be made to find a substitute for the word "recklessly" in the English text, as it appeared to convey the idea of fault or negligence, although the French and Spanish equivalents of the word did not.

46. Mr. BURMAN (United States of America) suggested that the last part of the second sentence should be amended to read: "(a) with the actual intent to cause loss, or (b) with gross recklessness and with actual knowledge that damage is likely to result."

47. Mr. FUJISHITA (Japan) said that if the second sentence were retained, he would oppose any effort to change its wording. A similar distinction had been established in the case of transport agreements; he could therefore see no objection to the wording of the second part of the sentence.

48. Mr. GREGORY (United Kingdom) supported the amendment suggested by the Australian representative. The term "gross recklessness" suggested by the United States representative had no meaning in English law. He noted that paragraph (8) did not provide that remedies should be available, but only that those remedies should be exclusive and that no other remedy should be available except where provided for under national law.

49. The CHAIRMAN stressed that the Commission was working on an international instrument, which made it inappropriate to use concepts specific to a given legal system. The word "recklessly" for example, was not to be interpreted with reference to the concept of "negligence" as used specifically in civil-law systems. Terms used in international instruments tended to be descriptive in nature rather than strict legal concepts. By such means, international uniformity was achieved.

50. The word "recklessly" had first come into use in the context of transport agreements. The word had been much debated, precisely because it was not known how a court would interpret it. Until the term came before the courts, it carried only the Commission's own interpretation. There was no international case-law to guide the Commission's work, and therefore any term it selected should be descriptive and provide guidance to the courts on the Commission's intentions. He recalled the proposal to include a rule of uniform interpretation, typical of the international conventions drafted recently.

51. Mr. LE GUEN (France) favoured keeping article 16 (8) as currently drafted, for all of the reasons already given. Paragraph (8) struck a balance, and if the balance were changed, that might reopen the discussion of the entire draft Model Law.

52. He felt that a compromise solution might be to adopt the wording proposed by the delegation of Australia. If for the common-law countries it was necessary to stress the exceptional nature of the liability stipulated in the second sentence of paragraph (8), he would be in agreement with the wording "with actual knowledge".

53. Mr. EL-SHARKAWY (Egypt) also felt that the second sentence of paragraph (8) should be retained, pointing out that the terms used in (a) and (b) were widely used in several international conventions, and well known in both the common-law and the civil-law systems. In the latter, "intent to cause loss" equated with "fraud", and "recklessly" with "gross negligence".

54. Mr. FELSENFELD (United States of America) withdrew his delegation's earlier suggestion to add the word "gross" before "negligence", but stressed that "actual" when applied to "knowledge" was an important concept under United States law. While it would certainly be possible for the Drafting Group to find a different word conveying the same sense, the problem was in the concept itself of "actual knowledge", as it contrasted with what in United States legal usage would be called "constructive knowledge".

55. He cautioned against drawing analogies with transportation conventions. Transportation and international banking were totally different. International banking transfers involved hundreds of thousands of payment orders, while transportation involved far fewer transactions, much lower speed of transaction and much greater clarity of information. All parties to a transportation transaction were aware of the risks they were taking.

56. He also raised the question of the relationship of article 16 (8) to the provisions of article 13, the so-called "money back guarantee". The latter was a major new obligation undertaken by the banks, and it was his understanding that the quid pro quo for that obligation was the establishment of a severe limit on the liability which might arise for the banks in the ordinary course of payment transfers.

57. Mr. LIM (Singapore) said that the representative of the United Kingdom had already summarized the position with regard to the common-law countries, except for the United States. "Recklessness" was a concept well known in such countries. Although it might be argued that in the context of international instruments courts should not interpret the wording in their own local legal context, in the absence of any new definition, that was precisely what they would do.

58. With regard to the wording proposed by the United States, he had no objection to adding "actual" before "intent". On the other hand, he wondered whether it would be contradictory to add "actual" before "knowledge", since the very concept of "recklessness" meant that a party did not care what the outcome would be.

59. With regard to adding "gross" before "recklessness", he was aware that in the United States the concept of "recklessness" had caused problems in the courts, in that aggrieved parties in litigation had attempted to induce juries to exceed limits on liability by alleging recklessness. Adding the concept of "gross" might help in such cases, but he felt that in common-law jurisdictions it would not make any difference at all.

60. The CHAIRMAN said that according to the Hamburg Rules, the carrier was liable only to the extent that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result. He wondered whether such wording might be appropriate for the present Model Law.

61. Mr. SCHNEIDER (Germany) said that he was concerned with the actual meaning of "recklessly". If recklessness was a reduced form of intent, the concept could be deleted. If on the other hand, it was a qualified form of negligence, then that was a matter for concern, but he considered nevertheless that it should be deleted, since it was not desirable to refer to negligence in the text.

62. If the majority wished to retain the concept of "recklessness", then there was a need to discuss what was meant by "knowledge". Knowledge might be obtained in any random way, but he felt that the Model Law should specify that what was meant by "knowledge" was "specific information given by the sender that loss might occur".

63. Mr. GREGORY (United Kingdom) said that his delegation would be able to accept some wording along the lines of the Hamburg Rules, and indeed it might be desirable for the wording in the two instruments to be similar. He felt, however, that such wording did not address the concern of the United States with the issue of constructive knowledge, knowledge imputed to someone who did not, in fact, possess it.

64. Mr. GRIFFITH (Observer for Australia) pointed out that the Hamburg Rules specified either "with intent" or "recklessly", while the draft Model Law specified both concepts. He felt that the points made by the United States on "actual knowledge" were valid, and wondered whether the Drafting Group could adapt the wording of the Hamburg Rules to include the concept of "actual knowledge".

65. The CHAIRMAN suggested that the Commission might take advantage of the experience gathered in drafting the United Nations Convention on International Bills of Exchange and International Promissory Notes. In that Convention, a person was considered to have knowledge of a fact if he had actual knowledge of that fact or could not have been unaware of its existence. The latter portion of the definition was intended to deal with the problem of constructive knowledge, covering, for example, the case of a person who, aware that knowing something might cause him harm, closed his eyes to the knowledge. It might resolve the problem raised by the United States and Germany.

66. He hoped that consideration of that definition of knowledge and of other points would enable the Commission to reach a rapid conclusion and move on to other important issues.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 470th MEETING

Held at Headquarters, New York,
on Tuesday, 5 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 3.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 16 (continued)

1. Mr. GREGORY (United Kingdom) said that his delegation felt it would be useful for the Commission to continue its consideration of paragraph (8) of article 16, on the basis of the proposal made by the representative of the United States of America to add the word "actual" before the words "intent" and "knowledge" and to change the words "might result" to "would be likely to occur". The word "recklessly" would remain unchanged.

2. Mr. SCHNEIDER (Germany) said he was not sure that that proposal really helped to define the term "knowledge". It was not necessary to work out a detailed definition of that concept as long as the Commission considered that the term "recklessly" implied intent. However, the concept of knowledge could give rise to problems in a large bureaucracy or in groups of companies if, for example, the knowledge of one person in a corporation was assumed to be the knowledge of the whole corporation or the director of a holding company was supposed to know what was going on in the company's subsidiaries. The concept of knowledge should be mentioned in connection with the payment order by stipulating that a bank must be informed of any special risk; if it received specific information to that effect from the originator or sender, the bank could decide whether or not to accept a payment order. The phrase "actual knowledge" was far too broad.

3. Mr. CRAWFORD (Canada) said that the German proposal did not seem to solve the problem that the representative of Germany had raised. A reference to specific information provided by the sender would not solve the real problem of trying to determine what a corporation really knew. It would be unwise to rule out from the text doctrines that might exist in various systems of national law or to impute knowledge where it was generally accepted that it did not exist. The Commission would have to decide whether information given to a clerk by the sender of a payment order constituted knowledge of the corporation and whether everything that was said at the point of contract was part of the contract. The Commission should try to identify a responsible act that would credibly bind the bank or corporation to extraordinary terms. The matter should be referred to the Drafting Group.

4. Mr. EL-SHARKAWY (Egypt) agreed that the words "actual intent" should not be used, since actual intent or knowledge could not be proved in the case of legal entities like banks or corporations. Paragraph (8) should be retained as it stood.

5. Mr. GREGORY (United Kingdom) said that the rule in question applied only where a country wished to make additional remedies available. The Commission

(Mr. Gregory, United Kingdom)

should not stray too far into the area of corporate knowledge. It had been concerned about excluding constructive knowledge, and by agreeing to use the words "actual knowledge" it had addressed that concern. It was inappropriate to try to define actual knowledge further, given the complexity of corporate structures in the banking world. Nor was it appropriate to take into account information received from the sender, since information could be received from a variety of sources. If the information was known to the bank, it ought to bring the bank within the scope of the rule.

6. Mr. CHATURVEDI (India) said that his delegation did not support the proposal to add the word "actual" because it sought to make the scope of judicial review, remedy and intervention more exclusive. That course was inappropriate and did not accord with India's judicial system.

7. Mr. VASSEUR (Banking Federation of the European Community) recalled that there had been a case involving Manufacturers Hanover Trust when the United States courts had determined that the bank could not be held responsible for a transfer made by one office without the knowledge of the office responsible for transfers. He felt that paragraph (8) should be retained as it stood.

8. The CHAIRMAN said that the proposed amendment seemed to be acceptable to the Commission. It accorded with the objective of making a bank responsible if it failed to fulfil its obligations.

9. The concern expressed by the representative of Germany related to a different problem which should be considered by the Commission. It pertained not to liability as such, but to another requirement for the existence of liability, which would make the sender responsible for sending information.

10. Mr. FELSENFELD (United States of America) said that the problem raised by the representatives of Germany and Canada was not easily solved. One solution that had been found successful was to have the bank acknowledge in writing that it knew of the risk involved.

11. Mr. CHATURVEDI (India) said he agreed with the representative of the United States and therefore opposed the addition proposed by the representative of Germany since it would further curtail the scope of remedies a customer or sender could secure from a bank for its fault.

12. Mr. CRAWFORD (Canada) suggested that the German proposal might be incorporated elsewhere in the draft Model Law. It was really a specific application of the freedom envisaged in article 3 for the rights and obligations of parties to a credit transfer to be varied by their agreement. By giving a written acknowledgement of specific risk that it was undertaking, a bank would be operating outside the scope of the Model Law. The idea of a special contract to accomplish a specific result within a specific time was useful, but went too far. The Commission's objective was to isolate reprehensible conduct by a bank.

13. Mr. LOJENDIO (Spain) said that the problem could be resolved under paragraph (7), which made provision for a bank to assume greater liability.

14. Mr. DE BOER (Observer for the Netherlands) said that if the remedies were exclusive, as stated in paragraph (8), the exclusivity related to the specific subject, and if there was no remedy for a given subject there was no exclusivity.

15. Mr. CHATURVEDI (India) concurred with the Observer for the Netherlands. The exclusivity referred to in paragraph (8) applied only to the situation described in the Model Law.

16. Mr. LIM (Singapore) agreed that paragraph (8) as drafted might imply the existence of other remedies; however, if the word "remedy" was interpreted to mean "liability", that could mean that no liability could be maintained other than that covered by the Model Law.

17. Mr. AZZIMANE (Morocco) said that misinterpretation of paragraph (8) could be avoided if the phrase "the remedies provided in this law" was replaced by "the liability remedies provided in this article". Paragraph (8) would thus be better integrated with the whole of article 16 and there would be no risk of confusing the remedies specified in that article with other actions not related to liability.

18. Mr. PELICHET (Observer for The Hague Conference on Private International Law) endorsed the suggestion made by the representative of Morocco, which would avoid any confusion between the remedies mentioned in paragraph (8) and the "rights ... as may otherwise be provided by law" mentioned in articles 11(7) and 15.

19. Mr. EL-SHARKAWY (Egypt) said that if remedies other than the payment of interest existed, paragraph (8) should constitute a separate article. He agreed that the paragraph should refer to remedies "in this article" rather than "in this law".

20. Mr. BERGSTEN (Consultant to the Secretariat) drew attention to paragraph 40 of the comments on article 16 in document A/CN.9/346, referring to additional remedies that could be added to the text of the article or to the application of remedies generally available in the legal system.

21. Article 4(6) dealt with the obligations of sending banks. In executing a payment order, a receiving bank was of course obliged to send its own payment order and thus became a sending bank. The question before the Commission was whether it should not in that capacity be obliged to pay interest to its own receiving bank if its payment order was accepted and it did not then make it good promptly. There appeared to be no such obligation in the Model Law, nor was it entirely clear that the exclusivity statement in paragraph (8) precluded the payment of such interest, which members would no doubt agree should be payable.

(Mr. Bergsten)

22. With respect to the "duty to assist" mentioned in article 12, he referred to members to paragraph 5 of the comments on that article (A/CN.9/346) and noted that the Commission had decided at its twenty-fourth session that there should be no penalties set out in the Model Law for failure to assist.

23. Mr. GREGORY (United Kingdom) said he understood that a receiving bank was not liable, as a receiving bank, for any delay caused by a failure to pay. Yet if paragraph (8) stipulated that remedies were exclusive, there would be no requirement to pay interest that was otherwise due. That was a problem that required attention and was not addressed in paragraph (1).

24. Mr. BURMAN (United States of America) said his delegation was still not convinced that a problem existed, but thought that the proposal put forward by the representative of Morocco might resolve the issue quickly.

25. Mr. CHATURVEDI (India), supported by the representative of France and the Observer for the Netherlands, said that his delegation could support the Moroccan proposal. There would then be no need to clarify article 4(6), since article 16 would be self-contained.

26. Mr. GREGORY (United Kingdom) was not sure the proposal achieved the desired result. The operative sentence of paragraph (8) was the second one, beginning "these remedies shall be exclusive ...", and the proposed change did nothing to alter it.

27. Mr. BURMAN (United States of America) said that in order to clarify paragraph (8) the Drafting Group might wish to add a reference to other legal remedies similar to the references in articles 11(7) and 9(1).

28. Mr. LIM (Singapore) thought that the problem raised by the representative of the United Kingdom could be solved by adding "in respect of liability under this article" after the word "remedies" in the second sentence of paragraph (8), although that did not deal with the problem posed by article 12.

29. Mr. CRAWFORD (Canada) said that as no remedy was provided in articles such as 4(6), article 16 had no bearing on them. Each jurisdiction had its own remedies. If remedies were not relevant to article 16, then the article needed no modification. Moreover, if the "obligation to repay" that was mentioned in several articles was self-executing, then there was no need to address it in article 16; if it was not, then there was a need to enforce remedies in article 16.

30. There was also some confusion over the terms "right", "obligation", "duty" and "remedy", which seemed to be used with overlapping meanings. The Drafting Group might also have difficulty in distinguishing those terms.

31. The CHAIRMAN said that the exclusivity of remedies under article 16 should not affect the obligations under article 4(6), and it would therefore be desirable to eliminate any ambiguities. As for the enforcement of remedies for failure to assist, it seemed that the Commission preferred to leave the matter to the applicable law in each State.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

32. The CHAIRMAN said that the Commission appeared to want the remedies provided for to be exclusive to situations covered by the provisions of article 16, with the Model Law not seeking to exclude any remedies for failure to comply with the provisions of article 4(6). He therefore suggested that the Drafting Group should consider paragraph (8), taking into account the proposal made by the representative of Morocco.

33. It was so decided.

34. The CHAIRMAN said that another question arising in connection with article 16(8) resulted from article 11(5) and (6), under which the Model Law provided for a refund to be passed on to the benefactor in cases where a delay had occurred in a transfer from the originator to the benefactor. There were two possible solutions: either the Commission could stipulate that a refund with interest should be made, or it could remain silent on the matter. However, the decision concerning the exclusive nature of article 16 could lead to ambiguity in the context of article 11(5) and (6).

35. Mr. GREGORY (United Kingdom) said that his understanding was that the Commission sought to relate article 16(8) only to situations covered by article 16. That meant that the Commission should remain silent as to any remedies which might be available for failure to comply with refund obligations under article 11(5) and (6). He therefore wondered whether the Chairman was now proposing to include an additional provision in article 11 stipulating that interest should be payable for failure to comply with refund requirements.

36. The CHAIRMAN said that he was not making any such suggestion. It was simply that there had been no discussion of provisions other than article 4(6) to which article 16(8) might relate.

37. Mr. CRAWFORD (Canada) said that the whole question of the intended scope of article 16 needed to be considered. It was by no means certain that in its present form the article would preclude a court from awarding general damages in addition to the specific amount of repayment due. Throughout its discussions on the Model Law, the Commission had always taken the view that interest should be the only penalty imposed on banks which were late in fulfilling their obligations. Article 16 did not fully accomplish that objective, in that it did not extend the exclusivity function of paragraph (8) to every obligation contained in the Model Law. Unless the scope of article 16 was extended, it would remain open to national courts to award damages in excess of the amount required for repayment plus interest.

38. Mr. CHATURVEDI (India) said that in his view there had been sufficient discussion of the matter. The Commission had decided that exclusivity should apply only to article 16 and therefore articles 4(6) and 11(5) were not affected. The matter should now be left to the Drafting Group.

39. The CHAIRMAN recalled that, during the discussion on paragraph (1), the representative of Japan had accepted the paragraph on the understanding that his proposal concerning the cost of the issuance of new payment orders would be considered when the Commission took up paragraph (8).

40. Mr. FUJISHITA (Japan) said that his delegation did not support the retention of paragraph (8). If the paragraph was to be retained, the provision on damages which could not be recovered under paragraph (1) should include not only interest, but also legal fees and the cost of reissuing the credit transfer. The United Kingdom representative had explained earlier that liability provisions had been omitted from the redraft of article 16 because the article provided for an objective type of liability, an argument for which he found little justification.

41. Mr. CHATURVEDI (India) said that he supported the Japanese proposal.

42. The CHAIRMAN said that, after reviewing the report of the Commission's previous session (A/46/17), he had concluded that the attribution of legal fees had been omitted because it was considered to be a matter which fell within the purview of national, rather than international, law. At the urging of one delegation, it had been agreed that a footnote should be inserted, drawing the attention of national legislators to the need to attribute legal fees and other costs to the party which had failed to comply with a legal obligation. The footnote, however, was missing from the text, and he wondered what the reason for that was.

43. Mr. FUJISHITA (Japan) said he understood the Chairman to mean that each country that was party to a dispute was free to award legal fees; accordingly, he withdrew his proposal.

Article 17

44. The CHAIRMAN said that article 17(1) defined the moment of completion of a credit transfer as the moment when the beneficiary's bank accepted the payment order, thus releasing the bank from any further obligations towards the beneficiary. That was an objective definition which was acceptable to all parties to the transfer.

45. Mr. VASSEUR (Banking Federation of the European Community) said that at a previous meeting, he had drawn attention to the issue of force majeure, which was not taken into account by the text as currently drafted. Prior article 13, however, to which the secretariat had referred in paragraph 47 of its comments on article 16 (A/CN.9/346), had envisaged exemptions from the liability of banks under certain circumstances, such as the interruption of

(Mr. Vasseur)

communication facilities or equipment failures, suspension of payments by another bank, emergency conditions, and so on. His organization wanted to see that article reinstated in the Model Law. As a general rule, agreements between banks, or between banks and clients, contained force majeure provisions.

46. The CHAIRMAN, after reading out the text of prior article 13, said that the Working Group had decided to delete that text on the grounds that, even if a delay resulted from force majeure, the bank would still be holding the funds, which would be generating interest, and the beneficiary should retain the interest.

47. Mr. AL-NASSER (Saudi Arabia) proposed that paragraph (1) should be amended as follows: "The credit transfer takes place when the beneficiary's bank accepts the payment order and the bank becomes indebted to the beneficiary for the amount of the payment order".

48. Mr. SCHNEIDER (Germany) said that he shared the views expressed by the representative of the Banking Federation of the European Community. Not only footnotes, but whole articles sometimes disappeared. Articles 13 and 16 had once been combined; in the process of separating them, the provision on interest rates had been lost.

49. The CHAIRMAN said that prior article 13 had not simply disappeared. According to the report of the Working Group on International Payments on the work of its twenty-second session (A/CN.9/344), the Working Group had decided to delete the article because, as liability existed only for interest, according to the Model Law, there was no need to maintain a rule on exemption.

50. Mr. LE GUEN (France) said that his delegation had difficulty with the first sentence of paragraph (1). The notion that a credit transfer was completed when the beneficiary's bank accepted the payment order was not in keeping either with French law or with article 2 of the Model Law (Definitions). Under article 2, a transfer was defined by its purpose, namely, to place funds at the disposal of the beneficiary; however, article 17(1) did not deal with the final stage of the transaction and was therefore in conflict, not only with article 2, but also with the title of the Model Law. Problems also arose with regard to article 18 (Conflict of laws) since, if the relationship between the beneficiary and the bank remained outside the scope of the Model Law, an entirely new set of rules could be introduced in the course of the transaction.

51. The CHAIRMAN said that the initial draft of article 2 had contained a bracketed sentence to the effect that a credit transfer was completed when the beneficiary's bank accepted the funds. It had been decided, however, that a rule on completion did not belong in an article on definitions, and the sentence had been moved to article 17. Consideration had been given to designating as the moment of completion the moment when the transferred funds

(The Chairman)

were credited to the beneficiary's account; however, banking practices varied widely in different countries. Furthermore, the question of when to place the funds at the disposal of the beneficiary was for the bank to decide, and it would be difficult for a third party to determine that moment objectively.

The meeting rose at 6 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 471st MEETING

Held at Headquarters, New York,
on Wednesday, 6 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.10 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 of the draft Model Law, as set out in annex I to document A/46/17.

2. Mr. LE GUEN (France) thanked the Chairman for the explanations he had given the previous day on the background to article 17. Although aware of the dangers involved in reopening the discussion of article 17, he nevertheless felt that the article had to be improved. While it had been said that the operation of posting to an account was not a reliable criterion for determining the moment of completion of a credit transfer, article 5 did indeed rely on that criterion, and he felt that it could be used in article 17 as well.

3. Mr. CHATURVEDI (India) supported the position of France. The first sentence of article 17 (1) was inadequate, in that a credit transfer was completed only when the money actually reached the beneficiary.

4. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that European banks viewed the provisions of article 17 with disfavour, because those provisions were unnatural. Whether a transaction involved a small cash payment between individuals, or an electronic funds transfer through the banking system, it was completed only when the money was actually in the hands of the beneficiary. Article 17 (2) was particularly unnatural, in stating that "the obligation is discharged when the beneficiary's bank accepts the payment order". Under French legislation, and also under Swiss law, a credit transfer was completed only when the funds were at the disposal of the beneficiary. At the UNCITRAL session in Vienna in 1991, many countries, including Italy, Sweden, Canada, China and Finland had wanted to replace the notion of acceptance of the order with that of payment of the funds to the beneficiary. The Bank for International Settlements and the International Law Association had also had reservations with regard to article 17.

5. He had been led to believe that the real purpose of article 17 was to protect the originator against bankruptcy of the beneficiary's bank. If that were so, then it would be sufficient to specify in article 17 that a credit transfer was completed when the funds were made available to the beneficiary, on the understanding that the risk of bankruptcy of the beneficiary's bank was a risk borne by the beneficiary.

6. The Banking Federation had interviewed several large companies in France and Belgium, not one of which had agreed that a credit transfer could be regarded as completed when their own bank accepted the payment order. The eight cases defined in article 8 (1) had also engendered major uncertainty, on the grounds that it would be very difficult for the beneficiary to know when

(Mr. Vasseur)

his bank had actually accepted the order. A further question was that of the burden of proving when the order had been accepted. The Commission should not forget that the text which it was drafting was only a model law, and thus not binding on States, which could decide to accept or reject it or parts of it as they chose. He was sure that numerous States would reject article 17 as it stood.

7. The CHAIRMAN explained that his remarks the previous day had covered the main reasons for the wording of article 17, but that there were also others. However, protection of the originator against the risk of bankruptcy of the beneficiary's bank was not one of them. The intention of the article was to give a clear and objective definition of the point in time when the credit transfer was deemed to be completed, and to define who carried the burden of proof.

8. Mr. AZZIMAN (Morocco) supported the position of France and the Banking Federation.

9. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that article 17 (1) should be rewritten to state that a credit transfer was completed only when the funds were available to the beneficiary, for two reasons: firstly, internal consistency within the Model Law itself, namely consistency between articles 2 and 17, and secondly, avoidance of two different legal procedures, covering international and domestic credit transfers respectively.

10. Mr. MOORE (Nigeria) supported the view that a credit transfer was not completed until the beneficiary had received the funds.

11. Mr. SCHNEIDER (Germany) said he did not understand why there was a move to change article 17. Two different reasons had been given. On the one hand, there was the question of the underlying obligation, which could be said to have been discharged only when the beneficiary was in a position to earn interest on the funds in question.

12. On the other hand, article 17 also covered something very different, namely the moment at which the transaction itself was completed. If article 17 were changed, it would then be necessary for the Commission to return to all the other articles and check them all once more. For example, under article 13, the so-called "money-back guarantee" would continue to exist for the originator's bank, if article 17 were changed, until the money was actually in the beneficiary's account. He was sure that German banks would never agree to such a result from article 17.

13. The main point at issue could be found in article 10, the date of execution for value. He was willing to reconsider article 10, but had seen no reason so far to change article 17.

14. The CHAIRMAN agreed that to change the rule enshrined in article 17 would cause repercussions in many other articles.

15. Mr. EL-SHARKAWY (Egypt) said that the definition of the moment when a credit transfer was completed could vary according to two different hypotheses. If the intention was to define completion with respect to the beneficiary's bank, then article 17 as currently drafted was correct. If, on the other hand, the intention was to define completion with respect to the beneficiary, then it should be made clear that the transfer was not completed until the latter actually received the funds.

16. Mr. FELSENFELD (United States of America) said that article 17 (1) was part of a larger structure, consisting of many articles. There was a superficial appeal in stipulating that a credit transfer was not over until the funds reached the beneficiary, but that did not accord with standard commercial practice. The originator would normally be instructed to make a payment by sending funds to the beneficiary's bank, and would have discharged his obligations once the funds had reached that bank. That was all that could be demanded of the originator, because the relationship between the beneficiary and the beneficiary's bank was beyond the control of the originator. Article 17 (1) respected that basic principle. Some other transaction between originator and beneficiary might well be possible, but would be governed by the law of contract, and did not need to be covered by the Model Law.

17. Mr. GREGORY (United Kingdom) supported the position taken by the United States and Germany. The Commission should remember the actual purpose of the rule in article 17 (1). It was not to define when the obligation between the originator and the beneficiary was discharged (which was covered in article 17 (2)), but to define in a precise manner when a certain period came to an end. The Model Law as a whole set out the parties' responsibilities during a particular period, and article 17 (1) defined the duration of the actions involved. The Commission had decided not to deal with the relationship between the beneficiary and the beneficiary's bank, and the current drafting of article 17 (1) respected that decision. Many articles of the Model Law, such as articles 13 and 16, depended on article 17 as currently drafted, and would have to be changed if article 17 was changed. In addition, article 8 stated clear rules on when acceptance of a payment order took place, and to make a change in article 17 would call the certainty given by article 8 seriously into question.

18. He agreed, however, that within the context of article 17 (2) consideration had to be given to the question of the underlying obligation, as raised by the delegations of France and the Banking Federation.

19. Mr. JONES (United Kingdom) explained that 15 to 20 years ago, it had been relatively easy to determine exactly when money had been credited to an account, but the present speed and volume of electronic funds transfers meant that account balances were altering from minute to minute or second to

(Mr. Jones, United Kingdom)

second. Modern banks kept track of those movements by real-time computer systems, but at the end of the day each account's statement was established on the basis of its position after trading had stopped, and the instantaneous results drawn from the real-time system were discarded. That raised the question of which accounting system would be used to determine the moment at which funds were actually credited to a beneficiary's account.

20. Banks using a real-time system had two different credit limits which they applied to each account, one for the balance drawn up at the end of the day, and a different one, much higher, relating to the balance as it changed from moment to moment during the day. The fluctuations in balances could cause major problems and losses if a customer failed during the day, such as had been the case when the Bank of Credit and Commerce International had been closed down. There were additional complications if a bank was operating in different currencies and with clients in different time zones.

21. Mr. CRAWFORD (Canada) said that he fully shared the views expressed by the Chairman concerning the importance of the rule contained in article 17 (1) and the desirability of determining a clear point in time when a transfer was considered complete. He also agreed with most of the opinions expressed by the representatives of Germany and the United States of America on the matter. He had some difficulty, however, with the reasoning of the representative of Germany, which was based on the unexpressed assumption that the beneficiary would designate his bank for the purpose of receiving a transfer. The draft Model Law had established no such precondition. Indeed, as the text stood, the originator was free to designate any bank. The rule would work only if the bank was selected by the beneficiary and not by the originator of the transfer. One possible solution would be to include a definition of "beneficiary bank" modelled on the definition of "beneficiary", along the following lines: "Beneficiary bank" means the bank designated by the beneficiary to receive funds as a result of a credit transfer.

22. The CHAIRMAN wondered how, in such a case, the draft Model Law would be structured, since the designation of the beneficiary bank was provided for not in the payment order, but in the underlying relationship. He feared that the proposed solution might create another set of problems.

23. Mr. SANDOVAL (Chile) said that an international credit transfer was independent of the underlying relationship that led to such a transfer. In his view, article 17 (1) should remain unchanged since it fulfilled the Commission's objective of indicating the moment when a transfer was completed.

24. Mr. LOJENDIO (Spain) said that article 17 sought to deal simultaneously with two difficult issues, namely, the completion of a credit transfer and the discharge of the principal obligation. It was important to distinguish between those two questions. He had difficulty with the way in which the concept of completion of a transfer was reflected in paragraph (1). While that paragraph should be retained in order to forestall a reopening of other

(Mr. Lojendio, Spain)

questions on which agreement had already been reached, he did not believe that mere acceptance by a bank was sufficient to discharge the principal obligation of the originator of a transfer.

25. The CHAIRMAN said that the question currently before the Commission was that of the time of completion of the transfer. The matter of the discharge of an obligation was a separate issue which would be addressed in paragraph (2).

26. Mr. VASSEUR (Observer, Banking Federation of the European Community) pointed out that even the rapid electronic transfer of funds by coded message carried an indication of the beneficiary bank from the moment the payment order was given. He noted further that the Commission had earlier decided that the provisions of the draft Model Law would apply not only to electronic, but also to paper payments. The question of paper payments seemed to have been neglected since then.

27. The CHAIRMAN said that the rules contained in articles 6 and 8 concerning the time of transfer referred to all forms of transfer, including paper payments.

28. Mr. GREGORY (United Kingdom) said that the discussion on electronic payments had arisen because of the problems involved in determining the precise time of the completion of a transfer. No discrimination between different forms of transfer had been intended.

29. Referring to the suggestion of the representative of Canada to define "beneficiary bank" in order for the rule in paragraph (1) to be acceptable, he felt that the issue could not be dissociated from paragraph (2), which concerned the discharge of an obligation. The question, however, was not linked to the need for the Model Law to define the moment when a transfer was complete.

30. Mr. DUCHEK (Austria) agreed that paragraphs (1) and (2) should be considered together. The Commission should not interfere with the relationship between the originator and the beneficiary, and should concern itself only with the technical means of transferring the funds. In that regard, while the concept of time of completion might be feasible, it had legal consequences for the underlying transaction. He wondered whether paragraph (2) was at all necessary and whether its provisions were feasible. If the Commission felt, however, that rules were necessary to govern the underlying relationship between the originator and the beneficiary of a transfer, then he would support the proposal by the representative of France. It was unfortunate that, owing to the process of legislation followed by the Commission, such an important question had been raised at such a late stage.

31. The CHAIRMAN pointed out that the problem had not arisen at the last minute. The questions of the discharge of an obligation and the moment of completion of a credit transfer had been the subject of exhaustive discussion. The only new element was the contention that if paragraph (1) was changed, then the structure of the draft Model Law would need to be revised and new laws established to govern the relationship between a beneficiary and his bank. The Commission had addressed the difficult questions of acceptance and completion of a transfer before addressing other articles of the draft Model Law.

32. The practical difficulties encountered in the electronic and manual handling of accounts explained why articles 6 and 8 had contemplated all possibilities. The logic behind the structure of those articles was that the acceptance of an order by a beneficiary bank marked the moment of completion of the transfer.

33. Mr. LIM (Singapore) said that he shared the views just expressed by the Chairman. He wondered whether the representatives who advocated a change in the principle contained in article 17 (1) did so because of the juxtaposition of the terms "completion" and "discharging an obligation". At the Commission's previous session, the view had been expressed (A/46/17, para. 284) that some of the difficulties might be alleviated if the rule on completion were returned to its original location in article 2 (a) or, alternatively, if a reference to article 2 (a) were added to paragraph (1).

34. Ms. KOSKELO (Observer for Finland), referring to the need for a precise determination of the completion of a transfer, said that while it would be correct to rely on the time of acceptance by the beneficiary bank, she shared the view that, if the time of crediting was uncertain, then that uncertainty would affect the concept of acceptance. It had been pointed out that, under article 8, the earliest event that occurred would signify acceptance. Since crediting would be the first event, it was necessary to determine when the act of crediting was complete. While she did not object to the principle behind article 17 (1), a problem would arise if a precise time was necessary to determine the completion of a transfer. There might thus be need to further refine article 8 in order to reach a conclusion on the precise time of completion of the transfer. In that connection, she would welcome clarification from the representative of the United Kingdom on how he interpreted article 8 (1) (d).

35. While paragraphs (1) and (2) of article 17 dealt with separate problems, namely, the time of completion of a transfer and the time of discharge of an obligation, a lag between those two times could create problems for the originator, should difficulties arise for the beneficiary bank after it had accepted payment and before the discharge of the obligation. While the problems were separate, the solutions must be coordinated.

36. The suggestion that the scope of article 17 (1) should be limited to cases in which the beneficiary designated the beneficiary bank was also relevant to article 17 (2).

(Ms. Koskelo, Observer, Finland)

37. She was of the view that the first sentence of article 17 (1) should be qualified by some formulation such as "that is consistent with the originator's payment order" in order to forestall any problems in the application of articles 13 and 16, concerning liability.

38. The CHAIRMAN said that the mixing of the issues in paragraphs (1) and (2) would make it difficult to reach a conclusion. Paragraph (1) concerned the question of when a credit transfer was complete while, in paragraph (2), the Commission must decide whether to have a rule that referred to the discharge of the obligation stemming from an underlying transaction. In other words, it would have to decide whether to retain or delete paragraph (2). If it was retained, the Commission would have to decide whether discharge of the obligation would occur at the same time as or at a different time from that stipulated in paragraph (1).

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

39. Mr. LE GUEN (France) said he had the impression that some members of the Commission considered that the increasing practice of keeping accounts in real time complicated matters and made it difficult for banks to establish the exact time at which an account had been credited or debited. In his opinion, quite the opposite was true. French banks kept their clients' accounts in real time, and both the bank and the holder of the account had a much better knowledge of the transactions that had been made, and they received information about such transactions much more quickly than under previous systems. The problem referred to by the representative of the United Kingdom might therefore have its origin in the British accounting system.

40. His delegation was very interested in the pertinent comments made by the representative of Finland. It was his impression that what was understood by "acceptance" was to a large extent based on accounting practices. According to articles 6 and 8 of the draft Model Law, acceptance could take place when the bank credited or debited the account. He did not understand why the crediting or debiting of an account should be used to determine the precise time at which acceptance took place, while the same transactions could not be used to establish the precise point in time when a payment was completed.

41. Mr. BHALA (United States of America) said it was his understanding that the use of real-time systems had enabled the users of such systems to define more precisely the time at which certain transactions occurred, which included the crediting of accounts.

42. Mr. ROJANAPHAUR (Thailand) said that article 17 (1) dealt with the completion of credit transfers and must therefore be read in conjunction with article 17 (2), which dealt with the discharge of the originator's obligation. Article 17 (2) was important because, even if it could be assumed that the credit transfer as defined in article 8 had been completed, the

(Mr. Rojanaphaur, Thailand)

originator could not be considered to have discharged his obligation until the beneficiary received the full amount of the payment order in cash. His delegation could accept the text of articles 17 (1) and 17 (2) as they stood.

43. Mr. CHATURVEDI (India) said that the first sentence in article 17 (1) did not correspond with the definition of "credit transfer" as contained in article 2. According to that definition, "credit transfer" meant "one or more payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary", whereas in article 17 (1) the funds were not placed at the beneficiary's disposal. In that regard, the representative of France seemed to be suggesting that, rather than referring to the acceptance of the payment order by the beneficiary's bank, the Model Law should refer to the crediting or debiting of the account that would complete the credit transfer. Moreover, the representative of Finland had correctly observed that it was not possible to separate the concepts of completion of credit transfer and discharge of obligation.

44. He proposed that, in the first sentence of article 17 (1) the words "for the originator's bank" should be inserted after the words "a credit transfer". That would mean that the obligation of the originator's bank was discharged the moment the beneficiary's bank accepted the payment order.

45. Mr. KOMAROV (Russian Federation) said it was important to bear in mind that article 17 (1) stressed the fact that the Model Law dealt only with the relationship between banks and the originator, and not the relationship between the beneficiary's bank and the beneficiary. If the first part of article 17 (1) was deleted, the sphere of applicability of the Law would be unclear. His delegation therefore supported the proposal to leave article 17 (1) as it stood, on the understanding that it should be interpreted in the light of the provisions of other articles of the Law, in particular article 8, which defined "acceptance".

46. Mr. EWORE (Observer for Gabon) said that the concept of "completion" should not be placed in a context that favoured the bank, the beneficiary or the originator, but should take account of the situation from the standpoint of all three participants in the credit transfer. His delegation supported the comments made by the representative of France and those made by the representative of the Banking Federation.

47. The CHAIRMAN said that a number of delegations shared the concerns expressed by the representative of France, while a larger number of delegations supported the text of article 17 (1) as it stood. He suggested that those delegations that were not in favour of adopting article 17 (1) should accept it on a provisional basis in order to enable the Commission to proceed to the consideration of article 17 (2), at which time it would decide either to restrict the cases in which completion of a credit transfer meant the discharge of the underlying obligation, or would decide to delete the text dealing with completion of credit transfers.

48. Mr. LE GUEN (France) said that, before the Commission moved on to article 17 (2), it should consider the proposal made by the representative of Canada concerning article 17 (1).

49. Mr. CRAWFORD (Canada) said that his proposal had been intended to refer to draft article 17 (2), as it addressed the problems of discharge rather than completion.

50. The CHAIRMAN noted that it would in any case be necessary for the Commission to return to article 17 (1) when it had completed its consideration of article 17 (2).

51. It was his understanding that article 17 (2) did not presuppose discharge of the underlying obligation, but rather was intended to provide a rule concerning the time when the obligation was discharged. Many members of the Commission had expressed the view that the Model Law should not contain provisions regarding the discharge of the underlying obligation; if that view was accepted, it would be relatively easy to revise article 17 (2) accordingly.

52. Mr. SOUNO (Observer, International Monetary Fund) supported the Chairman's proposal to set aside article 17 (1) until the Commission had completed its consideration of article 17 (2). It seemed to him that there had been some confusion with regard to the meaning of "credit transfer" during the earlier discussion of article 17, as some representatives had been speaking in terms of the availability of funds, while the Commission had in mind the crediting and debiting of accounts, which was a quite separate matter. That confusion might continue to arise so long as article 17 (2) was retained. He was not sure, however, that the retention of article 17 (2) in the Model Law was completely necessary. The Commission's main purpose was to fill the existing legal vacuum concerning the electronic transfer of funds; he did not think it was essential to that purpose for it to go into all the situations that could arise under article 17 (2). The French representative might also feel more comfortable with the first sentence of article 17 (1) if article 17 (2) were deleted. It should be pointed out also that article 17 (1) by itself was entirely compatible with article 9 (1), while the addition of article 17 (2) might lead to some confusion between the two articles.

53. Mr. GREGORY (United Kingdom) said that the Commission's purpose was to increase certainty concerning electronic and other credit transfers. Article 17 (2) was helpful in that respect, even though it did not cover all possible situations. It was important to remember that it did not deal with the question of whether an obligation could be discharged by a credit transfer. If article 17 (2) did not exist, the originator would remain liable to pay the beneficiary even though the beneficiary had agreed to a credit transfer as an appropriate method of payment and all the steps set out in the Model Law had been taken.

(Mr. Gregory, United Kingdom)

54. The Canadian representative had raised the important question of the circumstances in which a beneficiary would be deemed to have agreed to accept payment by credit transfer. It seemed necessary to make it clear that the payment must be made to the last bank in the banking chain; he therefore suggested that the phrase "to the account indicated by the originator" in article 17 (2) should be amended to read "to the relevant bank".

55. Mr. DE BOER (Observer for the Netherlands) said he agreed that if article 17 (1) was adopted, article 17 (2) would also be necessary, as otherwise the uncertainties pointed out, for example, by the Finnish representative would remain. Article 17 (2) was also desirable for other reasons. Firstly, the interval between the time of receipt of the payment and the time of crediting was becoming smaller and smaller. Secondly, the system under which it was the moment of crediting that was decisive always seemed to require corrections; if article 17 (2) was accepted, the need for such corrections would disappear. The adoption of article 17 (2) would also be a contribution to international harmonization, as it would bring the rule into conformity with United States law; moreover, it should be relatively easy to make the change, as the rule was governed in most countries by case-law.

56. His delegation supported the suggestion that article 17 (2) should be completed, and proposed that that should be done by adding the words "unless the beneficiary has excluded payment into that account" at the end of the sentence.

The meeting rose at 1 p.m.

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Twenty-fifth session

SUMMARY RECORD OF THE 472nd MEETING

Held at Headquarters, New York,
on Wednesday, 6 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 17 (continued)

1. The CHAIRMAN said that there was an issue with regard to article 17 that had yet to be resolved, namely, that of payment orders executed by a receiving bank for amounts less than the amount of the payment order received. He drew attention to article 14, which provided that, in case of underpayment by a receiving bank, the bank was obligated to issue a payment order for the difference between the amounts. There appeared to be a discrepancy between article 14 and article 17 (2), which provided that a credit transfer was completed when the beneficiary's bank accepted the payment order. He wondered whether it might be necessary to clarify article 14, and recalled that, at its previous session, the Commission had agreed to postpone a final decision on the matter until it took up article 17.

2. Mr. LOJENDIO (Spain) said that article 14 left several questions unanswered. For example, it was unclear what remedies were envisaged in the case of a receiving bank which failed to comply with its obligations to send a second payment order. It was also unclear which party was entitled to claim the unpaid amount: the beneficiary or the originator, under the money-back guarantee provided for in article 13.

3. The CHAIRMAN said that, strictly according to the provisions of the Model Law, only the originator would have a right to the funds.

4. Mr. BURMAN (United States of America) said that the options available to the originator were either to seek the enforcement of article 14 under his national procedural law or to claim a refund with interest under article 13.

5. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to leave article 14 unchanged, pending further review of article 17.

6. It was so decided.

7. The CHAIRMAN recalled that, at its twenty-fourth session, the Commission had deferred to the current session a discussion of the possible discrepancy between article 5 (b) (ii) and article 17 (2).

8. Ms. KOSKELO (Observer for Finland) said that it was she who had raised the possibility of a discrepancy. Article 5 defined the moment when payment took place between two banks in the credit-transfer chain; paragraph 5 (b) (ii) envisaged a situation in which payment between the sending bank and the receiving bank took place at a third bank. The conflict

(Ms. Koskelo, Observer, Finland)

with article 17 (2) arose from the possibility that the reimbursement transaction was itself a credit transfer which would be governed by the Model Law. While article 17 (2) defined the time of payment as the moment when the third bank accepted the payment order, article 5 (b) (ii) defined it as the business day following the day on which the receiving bank learned that the funds were available. In her view, the conflict could not be resolved in the context of article 17; rather, it was necessary to redraft article 5 so that it defined the time of acceptance rather than the time of payment.

9. Mr. BHALA (United States of America) said that the issue raised by the Observer for Finland had already been dealt with under the Model Law. In the transfer chain, the originator issued a payment order to his bank, which issued a payment order to an intermediary bank. The intermediary bank issued a payment order to the beneficiary's bank, which then paid the beneficiary. Thereafter, under article 17 (2), all the parties would have discharged their obligations. Article 5, however, dealt with a different issue, namely, payment among three banks, which was sometimes referred to as "settlement". If each settlement transfer was treated as a separate transaction, then the parties should be relabelled, so that the beneficiary's bank became the beneficiary of the previous transfer, and so on. In that case, article 17 (2) would still be operative. If the Model Law definitions were applied consistently, no conflict would arise.

10. Mr. CRAWFORD (Canada) said he agreed with the Observer for Finland that a problem existed, and believed that the representative of the United States might have contributed part of the solution. A further contribution could be made by amending article 17 (2) so that obligations could be discharged only where the beneficiary's bank was designated by the beneficiary.

11. In drafting article 5 (b) (ii), the Commission had endeavoured to protect a bank from being required to accept an offer of settlement at a bank where it did not wish to have a credit. If a bank owing settlement transferred funds to another bank designated for that purpose by the bank receiving settlement, the safeguard of a day's delay would not be necessary. He believed that it would be preferable to narrow the scope of paragraph (2) rather than adopt the solution proposed by the Observer for Finland.

12. Mr. GREGORY (United Kingdom) said that a conflict might arise where, in the process described by the representative of the United States, the originator's bank issued a payment order to the intermediary bank and made payment by means of a credit transfer. That transfer would be a separate and subsidiary transaction, in which the originator's bank would become the originator and the intermediary bank would become the beneficiary; if payment was made at another bank, that bank too would become an intermediary. Under article 17 (2), the subsidiary transfer would be completed when the lesser intermediary bank, or the settlement bank, accepted the payment order. Yet under article 5 (b) (ii), the originator's bank would be deemed to have paid the next bank in the chain when credit was made, or when the payee used the

(Mr. Gregory, United Kingdom)

funds. The draft Model Law thus contained different rules, which could produce different results.

13. Since the primary purpose of article 5 was to enable articles 6 and 8 to operate properly, it might be advisable to insert the phrase "For the purposes of articles 6 and 8" at the beginning of article 5.

14. The CHAIRMAN said that the sole purpose of article 5 was to establish a specific time; it had nothing to do with discharging obligations.

15. Mr. FELSENFELD (United States of America) said that the Commission might not be faced with a problem of inconsistency after all. The opening words of article 5 referred only to the moment when payment of the sender's obligation under article 4 (6) occurred. In that sense, what was involved was clearly a transfer subsidiary to the main credit transfer, with its own time structure; no conflict would arise between the rules of article 4 (6) and those of article 17 (2) because they dealt with two different situations. It might, however, be necessary to treat the subsidiary transfer as a separate transaction, in which case article 17 (2) would apply.

16. Ms. KOSKELO (Observer for Finland) said that she fully supported the representative of the United Kingdom. There was an obscurity in the text which should be removed by amending the chapeau of article 5.

17. Mr. FUJISHITA (Japan) agreed that there was a conflict between article 5 and article 17 (2) which could be resolved by amending the chapeau of article 5. However, that would reopen the debate on article 5, which had already been approved at the previous session. An alternative would be to delete the second paragraph of article 17.

18. Mr. DE BOER (Observer for the Netherlands) agreed with the representative of the United Kingdom that the scope of article 5 was too broad and should be limited to articles 6 and 8.

19. Mr. BURMAN (United States of America) asked whether the Commission could defer its consideration of paragraph (3), since any changes to that paragraph would have to be carefully checked against other articles of the Model Law for consistency.

20. Mr. CHATURVEDI (India) agreed with the representative of the United States that the Commission should not make changes which would materially affect the sender's obligations; it should not adopt paragraph (3) prematurely.

21. Mr. FUJISHITA (Japan) recalled that the representative of Finland had made the proposal to add a phrase at the end of the first sentence of article 17 (1) to ensure that a payment order accepted by the beneficiary's bank was consistent with the payment order issued by the originator both in respect of the indication of the beneficiary and in respect of the amount of payment. He was in favour of that proposal.

22. The CHAIRMAN said that the Commission had addressed that question in connection with article 14.

23. Ms. KOSKELO (Observer for Finland) said that the situation addressed in article 14 was only part of the problem. There were two ways a credit transfer could go wrong: the amount could change on the way - the situation covered in article 14 - or the designation of the beneficiary could be mistakenly changed, so that the final beneficiary bank was not the beneficiary designated by the originator. In such a situation the credit transfer could not be considered to have been completed. There was no provision in the current text of the Model Law to deal with that problem.

24. Mr. CRAWFORD (Canada) said that that idea was embodied in article 7 (2), concerning the obligation to issue a payment order consistent with the contents of the payment order received by the receiving bank and containing the instructions necessary to implement the credit transfer. That idea was also reflected in article 17 (1). Unless every bank in the chain performed the duty laid down in article 7 (2), the transfer was not complete. Nevertheless, the Finnish proposal posed no major problem.

25. Mr. BURMAN (United States of America) said that the matter seemed to be a drafting issue which could perhaps be referred to the Drafting Group.

26. The CHAIRMAN suggested that the Commission should adopt the Finnish proposal; no one could maintain that a payment order accepted by a beneficiary bank other than the bank designated by the sender was complete.

27. Mr. BURMAN (United States of America) asked what would happen in the event of a late payment order if the Finnish proposal was adopted.

28. Ms. KOSKELO (Obsever for Finland) said that a credit transfer should be considered to be complete when a beneficiary bank accepted a payment order consistent with the payment order of the originator. The existence of a delay would be determined by the provisions governing the time of execution, not the contents of the payment order from the originator. It was important to make that clarification in article 17 (1).

29. Mr. BHALA (United States of America) said he thought that the Finnish proposal might in itself create problems. For example, the beneficiary's bank would not necessarily know what had been said in the original payment order, giving rise, yet again, to a matching problem.

30. The CHAIRMAN said that the beneficiary's bank, when it received an accepted payment order, never knew whether it was consistent with the order issued by the originator's bank. The Finnish proposal should be dealt with by the Drafting Group, which should ensure that the Model Law clearly stipulated that no one could consider a credit transfer to have been completed if a payment order had been accepted by a bank other than the beneficiary bank designated by the originator.

31. Mr. CHATURVEDI (India) said that his delegation fully supported the suggestion made by the Observer for Finland. The problem was not merely a drafting problem; it was essential that a payment order that was accepted should be consistent with the payment order of the sender.

32. Ms. KOSKELO (Observer for Finland) said that she was not insisting on the actual wording of her proposal. The amendment could indicate that a payment order accepted by the beneficiary bank must be for the benefit of the beneficiary defined as the person designated by the originator.

33. Mr. DE BOER (Observer for the Netherlands) said that he could accept that wording.

34. Mr. GREGORY (United Kingdom) said that the original proposal by the Observer for Finland would have addressed both the problem of a payment received by the wrong bank that was not completed because the amount was too small and the problem of a payment order accepted by the wrong beneficiary bank.

35. Mr. BURMAN (United States of America) said that his delegation would not object to the addition of the words "for the benefit of the beneficiary".

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

36. Mr. SCHNEIDER (Germany) said that paragraph (3) of article 17 dealt with the underlying obligation between the originator and the beneficiary but that the Commission had yet to decide whether it wanted any rules on the underlying obligation in the Model Law.

37. The CHAIRMAN questioned whether paragraph (3) had anything to do with the underlying obligation.

38. Mr. PELICHET (Observer, The Hague Conference on Private International Law) explained that the reference to "the applicable law" was in fact a reference to the underlying obligation. He proposed that that reference should be made explicit by adding the words "governing the underlying obligation" after the phrase "the applicable law".

39. Mr. CHATURVEDI (India) wondered whether it might not be better to add the word "service" before the word "charges" in the second sentence.

40. The CHAIRMAN said that the Model Law did not deal with service charges. Customary practice in international banking allowed banks to deduct from transfers the amount of any charges. The deduction of such charges could not invalidate the transaction.

41. Mr. CHATURVEDI said that he had meant to stipulate that the bank should be entitled to deduct service charges only, and not other costs.

42. Mr. GREGORY (United Kingdom) said it was understood that the charges were for the transfer; consequently, there was no need to add "service". Indeed, that might only generate more debate. However, he welcomed the addition proposed by the Observer for The Hague Conference.

43. Mr. BURMAN (United States of America) said that his delegation supported that proposal. However, the completion of the credit transfer might have results pertinent to paragraphs (1) and (2). Care should be taken in drafting to preserve any rights or obligations that might flow from the completion of the credit transfer.

44. Mr. CRAWFORD (Canada) expressed his support for the changes proposed by the Observer for The Hague Conference.

45. Mr. DUCHEK (Austria) said that the second sentence of paragraph (3) might give the wrong impression. It obviously concerned to the relationship between the originator and the beneficiary, but in specifying certain rights that could not be prejudiced, it might preclude other rights. During the previous day's discussion on liability, it had been made clear that if, under the law applicable to the underlying obligation, a beneficiary was entitled to ask an originator for compensation for any damage resulting from a delay in payment, that right was not influenced by the Commission's rules. Likewise, the rights involved in the situation described in article 17 (3) were not necessarily influenced by the Model Law.

46. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that he was ill at ease with paragraph (3), as it dealt with two quite different matters. The first sentence was concerned with the completion of the credit transfer and the second with cost-sharing. He supported the suggestion put forward by the Observer for The Hague Conference, since the "applicable law" must certainly be the law applicable to the underlying obligation. The sharing of costs between the beneficiary and the originator, however, was not governed by any such law, but only by agreements between the two parties. That difficulty could be avoided by adding wording such as "and of the agrements concluded between the beneficiary and the originator" after the phrase "applicable law".

47. Given that paragraph (3) was an amalgam of two different subjects, the second sentence was in fact inappropriate and should be deleted. It would be appropriate only if the Model Law contained specific provisions regarding cost-sharing, which it did not.

48. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that he supported the proposal made by the Observer for The Hague Conference, which would help clarify the text.

49. Mr. GREGORY (United Kingdom) said that paragraph (3) was a supplementary rule intended to clarify paragraph (1) by stipulating that a credit transfer

(Mr. Gregory, United Kingdom)

was complete even though charges might have been deducted. It was not meant to address the question of whether such charges could be deducted.

50. He did not fully understand the remark by the representative of the United States that the rights and obligations specified in the Model Law needed to be preserved. The Model Law did not deal with the right of the beneficiary to recover charges from the originator, and he wondered which rights and obligations did need to be preserved.

51. The representative of Austria had expressed concern that the reference to the right of the beneficiary to recover charges from the originator might implicitly exclude other rights of the beneficiary vis-à-vis the originator in different situations. However, the Model Law was clear on that point. Perhaps the second sentence should be amended to ensure that it followed on clearly from the first. It was the rule contained in the first sentence which should not prejudice the right of the beneficiary to recover charges, rather than the completion of the transfer itself.

52. With regard to the proposal by the Observer for the Banking Federation of the European Community that reference should be made to any agreements under which charges might be payable, it was sufficient to refer to the applicable law governing the underlying transaction, since any agreement which failed to comply with that law would not be valid.

53. Mr. EFFROS (Observer, International Monetary Fund) was concerned that, under the provisions as they stood, a beneficiary receiving less than the full amount of a transfer would have an excuse for breaking his contract, while the originator would not know if the full amount required had been delivered until it was too late. The rule appeared to protect banks, while failing to take into account the greater interests of customers. It would be better to specify that the amount originally sent should always be delivered and that any unanticipated charges could be referred back through the chain of banks involved in the transaction and charged to the originator.

54. Mr. BHALA (United States of America) felt that the matter should be kept in perspective, given that the sums concerned were insignificant. There was a general consensus that, if charges were deducted, the beneficiary's right to recover those charges should not be prejudiced. In the interests of clarity, the drafting amendment proposed by the Observer for The Hague Conference should be included, but there was no need for extensive redrafting of the provision at the present late stage.

55. Mr. AL-NASSER (Saudi Arabia) agreed with the Observer for the Banking Federation of the European Community that it was not appropriate to include paragraph (3) in article 17. It would be preferable to include it as the second paragraph of article 14.

56. Mr. LIM (Singapore) said that the point made by the representative of Austria was a valid one. The principle of consistency in the drafting of the

(Mr. Lim, Singapore)

Model Law was very important. The rights of the parties in the underlying transaction were not expressly preserved in other parts of the Law, and to do so in article 17 might lead to difficulties of interpretation.

57. Article 17 was confusing in that it dealt with both the completion of the credit transfer and the underlying transaction. He agreed with the representative of Germany that paragraph (3) might appear to refer to the underlying transaction rather than the completion of the transfer. While the problem was one of drafting, the need for consistency was paramount.

58. Mr. EL-SHARKAWY (Egypt) proposed that the words "under the applicable law" in paragraph (3) should be deleted, since there was some confusion as to what they actually meant. He felt that there was no need for the Model Law to provide for the beneficiary's right to recover charges from the originator at all, since it was covered by the general principles of law.

59. Mr. ZHAO Chengbi (China) said that, as article 17 (3) would prejudice other articles, there was a need for greater consistency.

60. Mr. CHATURVEDI (India) said that he supported the proposal made by the Observer for the International Monetary Fund (IMF), since he felt that paragraph (3) might seriously jeopardize international contracts. The paragraph should therefore be revised.

61. The CHAIRMAN noted that there was a substantial divergence of views on the question. However, there did seem to be a general consensus in support of the proposal made by the Observer for The Hague Conference. He therefore suggested that the Drafting Group should be asked to insert the words "governing the underlying obligation" after the words "the applicable law" in paragraph (3).

62. It was so decided.

63. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the observer for IMF had raised an important point which the Commission ought to discuss.

64. The CHAIRMAN said that he did not feel that the remarks made by the Observer for IMF were a source of concern to delegations. In his view, the sums concerned were so small that they could scarcely be considered valid justification for breaking a contract.

65. Mr. CRAWFORD (Canada) said that emphasis should be placed on the distinction between the completion of the credit transfer as an abstract exercise and the discharge of the underlying obligation. Paragraph (3) did not aim to extinguish that obligation, and there was no need to amend it in order to achieve the result desired by the Observers for IMF and The Hague Conference.

The meeting rose at 5.55 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 473rd MEETING

Held at Headquarters, New York,
on Thursday, 7 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. Mr. BHALA (United States of America), speaking for his delegation and that of France, proposed that the following sentence should be added at the end of article 17 (1) of the draft Model Law (A/46/17, annex I): "Completion does not otherwise affect the relationship between the beneficiary and the beneficiary's bank". The purpose of that addition was to ensure that completion did not interfere with the relationship between the beneficiary and the beneficiary's bank except as set forth in the second sentence of article 17 (1).

2. Mr. LE GUEN (France) noted that no change was being proposed in article 17 (2). The sponsors had not accepted the suggestion that the phrase "obligation of the originator to the beneficiary" in article 17 (2) should be amended to read "obligation of the originator to pay the beneficiary", apparently in order to satisfy the needs of civil-law countries.

3. Mr. CHATURVEDI (India) said that he was not entirely satisfied with the new text, because it did not cover the case of partial acceptance by a beneficiary's bank of a transfer. Nevertheless, he could agree to the addition.

4. The CHAIRMAN pointed out that the Commission had decided at an earlier meeting, when considering the relationship between article 17 (1) and article 14, which dealt with partial payment, to make no change in article 17 (2) with respect to partial payment.

5. Mr. EL-SHARKAWY (Egypt) said that the additional sentence proposed for article 17 (1) satisfied some of his objections, but still left some problems with respect to article 17 (2). He suggested that the additional sentence should be made a separate paragraph in order to cover cases arising under either paragraph (1) or paragraph (2) of article 17.

6. Mr. CRAWFORD (Canada) said he regretted that article 17 (2) had not been changed to give explicit expression to the implied condition that the beneficiary had selected the beneficiary's bank. If the addition to article 17 (1) was intended to reflect that idea, he thought it should be discussed further; if it was not, he wondered why the idea had been dropped.

7. Mr. GREGORY (United Kingdom) said that he welcomed the addition proposed in article 17 (1), but considered that the problem raised by the representative of Canada at an earlier meeting, concerning article 17 (2), needed to be addressed. Although it had been decided that no change would be made in article 17 (1) to take partial payment into account, something additional was needed in article 17 (2) in order to take it into account there.

8. The CHAIRMAN said that he would ask the Drafting Group to take that point into consideration when it reviewed article 17.

9. Mr. FUJISHITA (Japan) asked the sponsors of the amendment for further clarification of the purpose of the new sentence.

10. Mr. LE GUEN (France) said that the purpose of the additional sentence was to bring article 17 (1) into conformity with article 17 (2), which defined the credit transfer in terms of the whole of the transaction.

11. Mr. DUCHEK (Austria) said that from the point of view of internal consistency, it would be equally logical to add that the internal relationship between the originator and the beneficiary also remained unaffected.

12. The CHAIRMAN said that that point would be dealt with when the Commission considered article 17 (2). He noted that the reasons for regulating the relationship between the originator and the bank had to do with the central compromise underlying the Model Law: the compromise between giving the originator the right of refund without the involvement of foreign legal systems, and the need to give banks the benefit of limited liability as set forth in article 16. The beneficiary was not in the same position; if he had not received the transfer, he retained all the rights accruing to him under the Model Law.

13. Mr. AZZIMANE (Morocco) said that two concepts of credit transfer had been put forward in the Commission earlier in the session, one restrictive and the other broad. It had been his understanding that the purpose of amending article 17 (1) was to strike a compromise between those two concepts. However, the addition proposed by the United States and France did not seem to be a compromise, as it simply adopted the restrictive concept. Although the change proposed did not seem to affect article 17 (1) materially, it might have a greater effect on article 17 (2).

14. Mr. LE GUEN (France) said that his delegation, like Morocco's, had originally been opposed to article 17 (1), but had agreed to it because a majority of the Commission was in favour of it. In view of that situation, it was proposing the addition of the new sentence simply in order to preserve the internal logic of the article.

15. Mr. CHATURVEDI (India) said he supported the Austrian representative's suggestion to the effect that the new sentence should indicate that not only the relationship between the beneficiary and the beneficiary's bank, but the relationship between the beneficiary and the originator remained unaffected.

16. The CHAIRMAN said he took it that article 17 (1), as amended, was adopted.

17. It was so decided.

18. The CHAIRMAN invited the Commission to take up article 17 (2), and asked those who had voiced objections to that article at earlier meetings to restate them.

19. Mr. CRAWFORD (Canada) recalled that he had expressed the view that the rule of discharge stated in article 17 (2) worked fairly only if the beneficiary had designated the account. Other delegations had apparently interpreted the phrase "that can be discharged by credit transfer ..." as preserving the rights of the beneficiary. He wondered whether that interpretation had been recorded in the Commission's records, but was concerned in any case that the reference to "the account indicated by the originator" seemed to invite misinterpretation.

20. Mr. FUJISHITA (Japan) said that he had not been convinced by the arguments for retaining article 17 (2). The article clearly interfered with the relationship between the originator and the beneficiary, which was something the Model Law should not do. Moreover, the paragraph introduced an element of uncertainty through its use of the words "can be". Further, as article 5 dealt with the credit risk or credit exposure of the receiving bank, he saw no reason for not dealing also with the credit risk or exposure of the beneficiary. Other arguments against the retention of article 17 (2) had been put forward eloquently by a number of observers. For those reasons, he could not support article 17 (2).

21. Mr. GREGORY (United Kingdom) said it was true that the words "can be discharged" could be understood as implying prior agreement by the originator. His delegation, however, continued to believe, for all of the reasons he had stated at an earlier meeting, that article 17 (2) should be retained.

22. Mr. AZZIMANE (Morocco) said that he wished neither to approve nor disapprove of article 17 (2), but simply to understand the reason for it. It had often been said that paragraph (2) only marginally affected the underlying obligation, but in fact it dealt fundamentally with the discharge of that very obligation. As the Commission had decided to formulate article 17 (1) so abstractly, he did not understand why article 17 (2) dealt with so concrete and specific an issue.

23. The CHAIRMAN stated that article 17 (2) defined the moment when the underlying obligation was discharged. It was, indeed, the only instance in the Model Law dealing with the underlying obligation. It was necessary to have such a definition, precisely because electronic transfers were so fast and so voluminous. When agreement between the parties, or the Law, stipulated that an electronic transfer of funds amounted to a discharge of an obligation, then there was a need for the moment of discharge to be defined very precisely.

24. Mr. SCHNEIDER (Germany) said that the rule enshrined in article 17 (2) was one of the most important in the entire Model Law, but like the representative of Japan he felt it had no place there. During the course of

(Mr. Schneider, Germany)

its work, the Commission had learned that the situation varied widely from country to country, both as to banking practice and as to legal framework. In some countries, electronic transfers were used for high volumes of funds, in others for much smaller volumes, and in addition banking rules differed from country to country. There was a need for harmonization, indeed there had been many attempts at harmonization, but with the proposed article 17 (2) the Commission appeared to be adding to, not reducing, the confusion. Of the many international conventions in existence, not one had a provision comparable to article 17 (2).

25. The question of the moment of discharge of the obligation had nothing to do with the transfer of funds itself. The Commission had decided to treat electronic transfers in a very abstract way, but with article 17 (2) it was turning away from that decision and dealing with one very specific and very concrete issue.

26. The proposed article 17 (2) enshrined a bad policy, one that would engender problems both for the system and for the consumer. The representative of Canada had said that article 17 (2) allowed some flexibility, by the inclusion of the term "can" in the phrase "an obligation of the originator to the beneficiary that can be discharged by credit transfer". Increasingly, however, credit transfer was the only way for an obligation to be discharged. He cited the example of a person obliged to pay for an insurance policy by credit transfer. If the transfer were not correctly accepted by the insurance company's bank, then under article 17 (2) the person would himself be liable for the loss of insurance coverage.

27. The Commission was seeking to establish consistency with other means of payment, such as cheques or cash, but was in the process of establishing, for electronic funds transfers, widely divergent rules as to when payment actually took place.

28. For all of the reasons he had given, he urged that article 17 (2) should be deleted.

29. Mr. BHALA (United States of America) said that his delegation regarded article 17 (2) as fundamental. Many assertions had been made against the article, but little argument. Whereas the representative of Japan felt that article 17 (2) interfered with the underlying relationship between the originator and the beneficiary, it had to be pointed out that the article did not come into play unless two conditions were met: "if the transfer was for the purpose of discharging an obligation" and if it "can be discharged by credit transfer". "Certainty" and "predictability" were the words he would use for what the representative of Japan dubbed "interference". One of the benefits of a rule on discharge of obligation, as enshrined in article 17 (2), was the avoidance of uncertainty. The representative of Japan felt that the phrase "can be discharged" injected a great deal of uncertainty, but, on the contrary, the stipulation in article 17 (2) of the two conditions which had to be fulfilled before the rule would apply resulted in anything but uncertainty.

(Mr. Bhala, United States)

30. The representative of Germany had drawn analogies with other conventions, pointing out that they did not contain a rule on discharge of obligation, but it had to be remembered that the Commission had always taken the view that credit transfers were a fundamentally different way of making payment. Therefore, analogies were unhelpful.

31. The representative of Japan had stated that since article 5 spoke of the credit exposure of the receiving bank, the Commission should also consider the credit risk of the beneficiary to the beneficiary's bank. The United States took the view that the Model Law was not intended to have any effect on the relationship between the beneficiary and the beneficiary's bank, because that was private.

32. Reference had been made to the eloquent argument put forward by the observer for IMF. Equally eloquent arguments had been made from other points of view, and references to an argument's eloquence did not help the discussion to move forward.

33. The representative of Germany had claimed that the situation with regard to electronic funds transfers differed from country to country, but if the Commission was to be deflected every time it discovered a situation which varied from one country to another, then very little progress towards harmonization would ever have been made. The question of the differing volumes of transfers handled by different countries had no effect on the applicability of the rule on discharge of obligation in article 17 (2), and in any event the Commission had decided not to make a distinction between situations which differed from country to country.

34. The representative of Germany had also claimed that the policy in article 17 (2) would harm the consumer. That was simply not true. The rule in article 17 (2) was a pro-consumer rule, in that it stated clearly to the ultimate users of the system when the obligation was discharged. As to loss of insurance coverage through lateness of acceptance, that problem had already been covered in article 16 (1), which stipulated that in such a case, the receiving bank would have to pay interest. With regard to the assertion that article 17 (2) would lead to problems relative to other conventions, it was not true that the Commission was attempting to harmonize electronic funds transfers with paper transfers.

35. As for the assertion that the Model Law should be abstract, that was a sound principle, but it must not be forgotten that the objective of the Model Law was something very practical. The issue covered in article 17 (2) was not one specific problem; it was the whole purpose of the credit transfer itself.

36. Mr. EL-SHARKAWY (Egypt) said that unlike some other representatives, he felt that the Model Law was the appropriate place to regulate the issue of discharge of obligation arising out of a credit transfer. It was important to determine not only when a credit transfer discharged the obligation of the

(Mr. El-Sharkawy, Egypt)

originator with respect to the beneficiary, but also when it discharged the obligation of the beneficiary's bank to the beneficiary. He therefore suggested that the addition to article 17 (1) put forward earlier by the representatives of France and the United States could also be adopted with respect to article 17 (2), either in a newly-drafted paragraph which would combine both article 17 (1) and 17 (2), or in an additional sentence in article 17 (2) stating that the discharge as described in the existing sentences of article 17 (2) did not affect the relationship between the beneficiary and the beneficiary's bank.

37. Mr. SANDOVAL (Chile) said that it was precisely the notion of abstraction which had engendered a high degree of certainty with respect to other payment instruments, such as cheques, and had allowed them to be used for transfers of funds. He felt that that principle of abstraction should be retained in the Model Law by deleting article 17 (2).

38. Mr. DUCHEK (Austria) said that while it had been stated that article 17 (2) did not interfere with the underlying relationship between the originator and the beneficiary, such statements had been unconvincing.

39. The Chairman had said that not to accept the compromise embodied in article 17 (2) would be to undo the drafting work of many years; that was an exaggeration. The formulation of article 17 (2) was in the interests of the banks in the payment chain, but detrimental both to the originator and to the beneficiary.

40. Returning to the example of an individual who lost insurance coverage through late payment of a transfer, he said that the consequent obligation by the receiving bank to pay interest was not the point at all. The rule covered in article 17 (2) should be removed from the Model Law, and left to the discretion of national legislatures. The more the provisions of a model law interfered with rights and obligations, the harder it became to transfer those provisions into national law. He supported the arguments of the representatives of Japan and Canada, found those of the representative of the United States to be unconvincing, and proposed that article 17 (2) should be deleted.

41. The CHAIRMAN said that there had been a misunderstanding. In speaking of undoing the drafting work of many years, he had not been alluding to article 17 (2).

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

42. The CHAIRMAN announced that the delegation of the United States of America had prepared a draft text which might help to resolve the current impasse.

43. Mr. BURMAN (United States of America) proposed that the following text should be added to the current wording of article 17 (2): "Payment under this paragraph is acceptance under article 17 (1) unless applicable law provides for an earlier time of payment". He hoped that the addition would accommodate those national systems which provided for the obligation to be discharged at an earlier time.

44. Mr. LIM (Singapore) supported the deletion of paragraph (2) on the grounds that it interfered with the underlying obligations of the parties concerned. The scope of paragraph (2) was very restrictive and was subject to article 3, concerning variation by agreement between the parties.

45. He wished to know whether the United States proposal contemplated a situation in which an underlying contract between two parties contained provisions that were contrary to the provisions of article 17 (2). Would such provisions be considered a variation of the provisions of article 17 (2) and thereby override them?

46. He suggested that the words "the same amount in cash" in article 17 (2) should be amended to make it clear that they referred to the same amount as stated in the payment order accepted by the beneficiary bank, and not the amount stated in the payment order issued by the originator.

47. Mr. BISCHOFF (Observer for Switzerland) supported the views expressed by the representatives of Austria, Chile, Germany and Japan. Many laws governing the contractual relationship between the originator and the beneficiary contained specific provisions that concerned the subject of article 17 (2). In many legislations, financial obligations must be met by the payment of a sum of money. Modern judicial practice, however, offered many exceptions to that principle, such as where parties agreed to the discharge of an obligation by a credit transfer. Paragraph (2), if retained, would not only call into question the acceptance of the intervention of the Model Law in national legislation, but would also require the reopening of questions on which agreement had already been reached, including the issues of force majeure and revocation of a payment order. While the Model Law itself should not be abstract, it must provide for an abstract concept of transfer.

48. The CHAIRMAN pointed out that whether or not article 17 (2) was retained, the provisions concerning force majeure and revocation of a payment order (art. 11) would not be affected. Paragraph (2) was based on the assumption that the bank had already received the order of payment, and the questions of force majeure and revocation of the order could therefore no longer arise.

49. Mr. KOMAROV (Russian Federation) said that he supported the retention of paragraph (2), whose language provided a degree of certainty as to the time of discharge of an obligation. He did not share the view that the provision interfered with the relationship between the originator and the beneficiary. It merely sought to create a rational link or bridge between the two banks

(Mr. Komarov, Russian Federation)

which they were free to use or not to use. The provision was worded in a practical way and would not prevent the parties from envisaging other possible times when an obligation would be considered as discharged.

50. Mr. VASSEUR (Observer, Banking Federation of the European Community) supported the position that paragraph (2) should be deleted. Acceptance by the beneficiary bank implied the discharge of the originator's obligation. The civil codes of most European countries contained provisions for the discharge of obligations and, if paragraph (2) were retained, an additional means of discharge of obligations would have to be introduced: when a credit transfer was effected to the beneficiary bank. The draft Model Law was not the vehicle through which to introduce an additional means of discharge of an obligation. Moreover, a transfer might be effected for other purposes, such as making a deposit or gift, and he failed to see why article 17 (2) should provide for only one purpose, namely, the discharge of an obligation. For that reason, he could not support the amendment proposed by the delegation of the United States, which referred only to the case of the discharge of an obligation.

51. Mr. HOLEC (Czechoslovakia), in supporting the deletion of paragraph (2), said that the provision must take into account the varying situations in different countries, since the Model Law would apply notwithstanding the means used for effecting the payment order.

52. The completion of a credit transfer and the discharge of an obligation were separate issues. Discharge of an obligation was a matter best dealt with by the applicable national law and, in his view, the Commission should stress the abstract nature of the payment order.

53. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that his delegation was in favour of deleting article 17 (2).

54. Mr. GREGORY (United Kingdom) said that all the arguments that had been put forward for the deletion of article 17 (2) seemed to be based on the concern that the Commission was interfering with the relationship between the originator and the beneficiary, as governed by national laws. That was, however, not the case. The Commission was not implying that a credit transfer could be used to discharge an obligation. Perhaps it might be advisable to indicate in article 17 (2) that the Law did not address the question of whether or not an obligation could be discharged by a credit transfer.

55. The adoption of the compromise proposal made by the representative of the United States might clarify the matter. The addition of the words "unless applicable law provides for an earlier time of payment" would allow national legislation to provide for an earlier time of payment.

56. Mr. JANSSON (Observer for Sweden) said that, in the light of the amendment proposed by the representative of Canada, his delegation could support the retention of article 17 (2).

57. Mr. MOORE (Nigeria) said that his delegation was also in favour of retaining article 17 (2).

58. Mr. FELSENFELD (United States of America) said that his delegation supported article 17 (2) because it was the only place in the Model Law that explained what the Law actually did. If article 17 (2) was deleted, the Model Law would deal only with abstractions and would not specify what international electronic transfers of funds should accomplish.

59. Mr. CHATURVEDI (India) inquired whether the United States proposal to amend article 17 (2) involved only the addition of the words "unless applicable law provides for an earlier time of payment" or whether the proposal also entailed other amendments.

60. Mr. BURMAN (United States of America) said that the proposal involved only an addition to the existing text of article 17 (2). While his delegation believed that the Model Law would perform its task better without the addition, it was willing to accept a modification in order to allay the concerns of some delegations.

61. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the United States proposal gave rise to some difficulty. It was quite probable that the law applicable to the underlying transaction was the same as the law applicable to payment. If a country that had adopted the Model Law had a national law that provided for an earlier time of payment than did the Model Law, he wished to know how a court would be able to determine the exact time discharge had occurred. It was necessary to specify what law was at issue and not refer simply to the "applicable law".

62. Mr. BHALA (United States of America) said that, in the situation described by the observer for the Hague Conference, the court would consider both the national law and the Model Law, and would apply the law that provided for the earlier time of discharge of payment.

The meeting rose at 1 p.m.

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Twenty-fifth session

SUMMARY RECORD OF THE 474th MEETING

Held at Headquarters, New York,
on Thursday, 7 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 17

1. The CHAIRMAN said that it had become clear at the previous meeting that there was no possibility of reaching consensus on eliminating or modifying article 17(2). He therefore suggested that the paragraph should be included in an annex as a provision related to completion of credit transfer and discharge of obligation.

2. Ms. KOSKELO (Observer for Finland) said that she felt it was important to keep article 17(2) in the Model Law; the amendment proposed by the representative of the United States of America would be acceptable.

3. Mr. SCHNEIDER (Germany) said that he had great difficulty with the idea of putting article 17(2) in an annex. In some of the directives of the European Community, important rules appeared in the form of an annex, and that arrangement had not been found helpful. If the paragraph was to be consigned to an annex, he would agree on condition that it was amended as suggested by the representative of the United Kingdom.

4. Mr. SANDOVAL (Chile) said it seemed that there was a majority in favour of deleting paragraph (2). His delegation would accept the paragraph only if it was placed in an annex to the Model Law.

5. Mr. DUCHEK (Austria) said it was clear that there was strong support for both schools of thought. He therefore wished to know what the implications of placing the paragraph in an annex would be. If an invitation to States to consider, in the context of the Model Law, questions relating to the influence of the credit transfer on the underlying transaction was included with paragraph (2), what relationship would the paragraph then have to the rules set out in the Model Law itself?

6. The CHAIRMAN said that the main objection to paragraph (2) had been that it was not relevant to the regulation of credit transfers; there had been no objection to the paragraph itself. By including the provision in an annex, the Commission would be recommending it to Governments for possible inclusion in the Model Law.

7. Mr. HERRMANN (Secretary of the Commission) said that the only model law adopted by the Commission so far had been the UNCITRAL Model Law on International Commercial Arbitration, and it did not have an annex. However, it did have a footnote drawing the attention of States to a certain point. In the Working Group on the New International Economic Order, which was drafting a model law on procurement, there had been a suggestion that certain

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provisions regarding the review of procurement proceedings should be included in an annex because they gave rise to questions of administrative and procedural law and because detailed rules of procedure might not be acceptable to many States. Those objections were similar to some of the objections that had been raised with regard to paragraph (2). The implications of including provisions in an annex would to some extent depend on what introductory wording, if any, was included with the provision; for example, a model clause might be included in a footnote as an additional clause on which parties might wish to agree. However, such a provision would be even more optional than the main text of the Model Law.

8. Mr. DE BOER (Observer for the Netherlands) said that he could support the United States proposal if it satisfied other delegations. However, probably no law provided for an earlier time in relation to credit transfers, apart from agreements between parties.

9. Mr. CHATURVEDI (India) said that his delegation, too, supported the deletion of the United States amendment; it referred to the time of payment, whereas paragraph (2) referred to the discharge of an obligation. If article 17(2) was included in an annex, then for all practical purposes it would be excluded from the Model Law.

10. Mr. FUJISHITA (Japan) said that his delegation was not entirely satisfied with either the United States or the United Kingdom amendments. While the United States amendment dealt with a situation where the applicable law provided for an earlier time of payment, it was not clear what would happen where the applicable law provided for a later time of payment. He saw no convincing reason why the time of completion should be assumed to be the time of discharge in that situation.

11. Mr. BURMAN (United States of America) said that the Commission's objective was to provide a new payment mechanism that would facilitate commerce, and not simply to develop inter-bank transfer rules. The concept of an annex was becoming less attractive to his delegation. In the past, the Chairman had taken the position that language in the Model Law could be changed or removed only if there was a strong majority in favour of such a course. At some earlier meetings, even when there had been a slight majority in favour of an amendment, the Chairman had determined that there was not enough support for a change, and his delegation had conceded some points. The same standard must be applied to the current situation.

12. The CHAIRMAN observed that if the Commission could not reach agreement on paragraph (2), it would not be able to adopt the Model Law at the current session.

13. Mr. GREGORY (United Kingdom) said that including paragraph (2) in an annex would be better than retaining a paragraph in the Model Law on which there was substantial disagreement.

14. Mr. BHALA (United States of America) asked what the effect would be if paragraph (2) was left in the Model Law, either in its existing form or as amended by his delegation, and placed in square brackets.

15. Mr. HERRMANN (Secretary of the Commission) said that square brackets in a final text had no established meaning, but might suggest that the final text was still a draft. It would be better to indicate that there had been no consensus on the paragraph, or to include the paragraph in a footnote marked by an asterisk.

16. Mr. ALVAREZ (Uruguay) suggested that paragraph (2) should be left in square brackets. The Commission could then proceed with its other work while conducting informal consultations in order to find a solution to the problems posed by that paragraph.

17. Mr. BURMAN (United States of America) welcomed that suggestion, noting that, if the Commission opted for square brackets, the provision would have to be accompanied by a statement indicating that it had not been agreed upon by the Commission.

18. Mr. EWORE (Observer for Gabon) said that the second sentence of paragraph (1) meant that the beneficiary's bank was obliged to pay the beneficiary the amount of the payment order. The Model Law needed a provision that would deal with the discharge of that obligation, and paragraph (2) met the case. Including it in an annex would not be useful. However, revising the last words of the paragraph, following the word "extent", to read "that it pays the amount indicated in the payment order" would emphasize the discharge of the originator's obligation to the beneficiary.

19. Mr. GREGORY (United Kingdom) felt that square brackets were not the right solution and agreed with the Secretary of the Commission that placing the paragraph in an annex would have the undesirable effect of making it more optional than the other provisions. However, the annex might contain an indication of where the paragraph would have been placed in the body of the Model Law.

20. Mr. DUCHEK (Austria) shared the view of the representative of the United Kingdom. The use of square brackets with or without a footnote would constitute a precedent, and not necessarily a desirable one, for the Commission.

21. Mr. EL-SHARKAWY (Egypt) said that all members conceded that the text should be optional. The Commission should not be concerned with following precedents as the Model Law was only the second such instrument it had drafted. There were many ways to show that the text was optional: in addition to those already suggested, the paragraph might be inserted under the title "Optional text".

22. Mr. BHALA (United States of America) said that the idea of putting the paragraph in an annex to the Model Law and saying that it was optional would be of no practical help, as indeed the whole Model Law was optional. Footnotes had been used in other instruments, such as the one relating to the Bank for International Settlements, to show that no consensus had been reached. In any event, his delegation felt that square brackets, a footnote or both must be used.

23. The CHAIRMAN said that many delegations were opposed to the use of square brackets, which had the disadvantage of drawing attention to the lack of agreement.

24. Mr. OLSZOWKA (Poland) suggested that an ad hoc neogtiating group should be established to find a compromise solution. Otherwise, his delegation would be in favour of retaining the paragraph in the text of the Model Law, perhaps in the manner outlined by the United States delegation.

25. The CHAIRMAN said that paragraph (2) as it stood was already the result of negotiations, and yet it continued to meet with strong opposition. There was resistance also to the footnote idea. As the only delegation opposed to the idea of placing the paragraph in an annex seemed to be the United States of America, he appealed to that delegation to display solidarity by accepting that idea.

26. Mr. BURMAN (United States of America) said that his delegation still thought that the worst option would be to place the paragraph in a separate document such as an annex. He therefore suggested that the entire paragraph should be included in a footnote to article 17. In that way, it would not be separated from the rest of the text.

27. Mr. KOMAROV (Russian Federation) said that the United States proposal appeared to meet his delegation's concern that the paragraph should be retained.

28. Mr. GREGORY (United Kingdom) said that his delegation, too, could accept the inclusion of the entire paragraph in a footnote. However, the Commission should indicate that there had been consensus on the placement of the paragraph, rather than that there had been no consensus on the text.

29. Mr. EL-SHARKAWY (Egypt) said that his delegation could also support the new proposal by the representative of the United States.

30. Mr. LIM (Singapore) said that his delegation also supported the proposal. Many countries had added provisions to the UNCITRAL Model Law on the International Commercial Arbitration, and there was no doubt that countries might do the same with the current text.

31. Mr. BISCHOFF (Observer for Switzerland) wondered whether the footnotes in the Model Law ought not to have the same function throughout the instrument. The footnote appended to article 1 served to define the scope of the law and reflected a consensus, while the footnote proposed for article 17 would point up a disagreement.

32. Mr. HERRMANN (Secretary of the Commission) said that the Model Law, once adopted, would be considered by legislators, who would then decide whether to model their own legislation after it. The distinction between the two kinds of footnote could be made clear by different wordings.

33. Mr. CHATURVEDI (India) said that the fact that there had been no consensus on the paragraph must be noted; otherwise, the footnote would not be distinct from the text.

Article 18

34. Mr. EL-SHARKAWY (Egypt) pointed out that, although the Model Law was intended to prevent any conflict of laws, article 18 was in fact entitled "Conflict of laws". The article should be deleted, as it was not appropriate in the Model Law.

35. The CHAIRMAN said that the Working Group had considered the fact that an international credit transfer by definition transited through various countries. Any one of those countries might not have adopted the Model Law, or might have adopted it only in part. Moreover, the Model Law itself might have lacunae that would lead to a conflict of national laws.

36. Mr. ABOUL-ENEIN (Observer, Cairo Regional Centre for International Commercial Arbitration) said that the issues raised by the conflict of laws governing international credit transfers were very complex. One of the difficulties in relation to article 18 was its ambiguity. In his view, no single conflicts rule would be appropriate for both electronic and paper-based transfers; accordingly, he thought that article 18 should be deleted. He also believed, however, that the parties to a transfer should have the freedom to choose the legal regime applicable to their transactions.

37. Mr. RENGER (Germany) said that the entire article should be deleted. For his country, as for other members of the European Economic Community, the article would raise more problems than it would solve, particularly with regard to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities.

38. Mr. DE BOER (Observer for the Netherlands) said that, in principle, he had no objection to the adoption of rules on private international law. However, as the proposed text did not have a high degree of refinement, he wondered whether it might not constitute an obstacle to the further development of international law.

39. Mr. PELICHET (Observer, The Hague Conference on International Private Law) said that his organization had submitted written observations to the Commission at its previous session suggesting that article 18 should be deleted. The Hague Conference did not believe that a single conflicts rule could apply to both paper-based and electronic transfers. Moreover, the Model Law was based on a unitary concept - as evidenced in particular by the provisions on the revocation of payment orders and the duty to refund - while under article 18, a transfer carried out in different countries was viewed as having various segments. If any of those countries had not adopted the Model Law, the compromise on which it was based would collapse.

40. Article 18 was modelled on Section 4A-507 of the United States Uniform Commercial Code, which had been adopted in an inter-American context. While the conflicts rule reflected in that provision might function in an inter-American context, it would not be appropriate for European countries. Even in the United States the rule was not applied: where transfers were effected through electronic transfer networks, such as FedWire or the Clearing House Interbank Payments Systems (CHIPS), the conflicts rules laid down in Section 4A-507 were set aside in favour of unitary-rule systems.

41. Moreover, merely deleting article 18 would not solve the problem in its entirety. The Hague Conference had put the issue on its agenda for future discussion. If the Commission decided to delete the article, he recommended that efforts should be undertaken, in collaboration with banks, to develop a unitary rule which could function in the context of electronic transfers.

42. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that, while his delegation had no difficulties with article 18 as a whole, it was unclear as to the meaning of the term "receiving banks" in paragraph (1), since each intermediary bank which took part in an international transfer was considered to be a receiving bank.

43. The CHAIRMAN said that paragraph (1) established a rule for each payment order, rather than for the entire transfer. All the operations required to carry out a payment order took place in the receiving bank, there being one receiving bank for each segment of the transfer.

44. Mr. EWORE (Observer for Gabon) said that the issue under discussion was highly sensitive. The arguments in favour of retaining paragraph (1) were legitimate, in view of the general lack of conflicts rules at the international level. The paragraph, however, raised some dangers. For example, if the parties to a transfer had the option of choosing the applicable law, it was to be expected that they would choose those national provisions with which they were most familiar. He therefore suggested that there should be an additional provision that would take into account both those States which had ratified the Model Law and those which had not, thereby ensuring that the Model Law would be applied at least by those countries which had ratified it.

45. Mr. FUJISHITA (Japan) said that he supported the deletion of the article.

46. Mr. OLSZOWKA (Poland) said that the article should be retained on the grounds that even an imperfect conflicts rule was better than none at all. While it was true that States which were already parties to conventions on conflict of laws would find it difficult to apply the provisions of the Model Law, ratification of such instruments was far from universal.

47. Despite its support for the article, his delegation felt that the expression "having different rules of law" in paragraph (3) (a) was ambiguous and might lead to conflicts.

48. Mrs. AUGIER (France) said that her delegation shared the views expressed by the observer for the Hague Conference and believed that, for a number of legal and practical reasons, the article should be deleted. She also supported the proposal to refer the question to a group of experts for review. It was unclear how a system based on article 18 could ensure certainty, which was the main purpose of the Model Law. For example, with regard to the application of article 13, the organization of a series of refund transfers could be disrupted if one party was able to invoke a law prohibiting such reimbursements.

49. Mr. BURMAN (United States of America) said that while article 18 was imperfect, its provisions, particularly paragraph (1), were supported by a number of United States commercial parties. The first sentence of that paragraph was probably acceptable to most delegations; it was intended to resolve situations in which commercial parties chose an applicable law which was not honoured by the courts owing to the lack of a statutory provision. The second sentence was more problematic. In the absence of a convention or some other means of binding countries to a common rule, the question raised by the representative of France could not be answered.

50. Mr. BHALA (United States of America), replying to the question raised by the observer for the Hague Conference, said that the FedWire rules had been enacted in United States law in what was known as Regulation J, which incorporated Article 4A of the Uniform Commercial Code. Consequently, the FedWire rules could not be cited as an argument against the retention of article 18, particularly as 37 American States had adopted Article 4A without amendment to date.

51. It was essential to consider the two parts of paragraph (1) separately. The first sentence was important because it allowed parties to agree that a single law should govern their transfer. The value of the second sentence was that it provided an element of certainty with regard to each aspect of a credit transfer. The provision stipulating that the law of the receiving bank would apply unless otherwise agreed was also useful because it dealt with the propensity of lawyers to seek out the most advantageous jurisdiction and prevented the unwarranted extraterritorial application of the law of a particular State.

52. The CHAIRMAN said that one of the major considerations borne in mind by the Working Group when adopting article 18 had been the existence of a complete lacuna in the area of conflict of laws. The article was thus intended as a first step in the drawing up of rules to remedy that situation.

53. Ms. KOSKELO (Observer for Finland) said that while there was general agreement on the need for provisions to govern conflict of laws, article 18 as currently drafted did not offer the best solution. The Working Group had not analysed the question in sufficient depth, and it was unlikely that States would be willing to adopt rules with which they did not feel comfortable. The provisions would not succeed in achieving harmonization in the field but might have the opposite effect by precluding the efforts of the Hague Conference to draw up its own rules on the subject. It would be preferable to allow the Hague Conference to take up the matter and give it thorough consideration. Article 18 should therefore be deleted.

54. The CHAIRMAN asked the observer for the Hague Conference if he could say when the Conference intended to start work on the question and how long its work might take.

55. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that a decision might be taken in June 1992 to start work immediately by submitting a questionnaire to banks, with a view to finding an appropriate basis for a solution. The results could then be submitted to the seventeenth session of the Conference in 1993 and, if the outlook was positive, the matter could be included on the agenda for the following session in 1996, when a convention could be drawn up and adopted.

56. Mr. JANSSON (Sweden) said that he fully endorsed the arguments put forward by the observer for the Hague Conference and therefore favoured the deletion of article 18.

57. Mr. DUCHEK (Austria) acknowledged that it was difficult to draft appropriate rules when several different jurisdictions were involved; nevertheless article 18(1) would not function properly in its current form. The aim of the article should be to identify a single law which would govern the whole operation.

58. There were also a number of technical deficiencies in paragraph (1). For example, it was not clear whether the reference to rights and obligations arising out of a payment order concerned the whole of a credit transfer; likewise it was unclear whether the obligation of the beneficiary's bank to the beneficiary after completion of the transfer was included. In addition, the terms "parties" and "agreement" were somewhat vague. In the light of all those considerations, he favoured the deletion of article 18.

59. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that his organization had conducted a survey among its 17 member associations concerning rulings by the courts in their country during the last 30 years on the question of conflict of laws with regard to international credit

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transfers. None of the member associations had been able to cite a single court decision. He therefore felt that the matter was of no great urgency.

60. The Banking Federation was opposed to article 18 in its existing form but was anxious to cooperate with the Hague Conference in giving serious and wide-ranging consideration to the question. In addition, the Banking Federation did not accept the notion of a credit transfer as a series of separate operations. It therefore agreed with the Hague Conference that efforts should be concentrated on devising a single law which considered credit transfers as a single operation. With that in view, the most appropriate provisions would be those of the law of the place where the beneficiary's bank was established.

The meeting rose at 5.55 p.m.